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Common Ground: Community-Owned Land as a Platform for Equitable and Sustainable Development

By JOHN EMMEUS DAVIS*

Introduction

LAND, LABOR, AND CAPITAL are considered to be the primary factors of production, regardless of whether one is planning for the fabrication of durable goods in an industrial plant or the revitalization of dilapidated homes in a residential neighborhood.[1] Every analysis of a project's feasibility begins here. A great deal of creative thought is devoted, accordingly, to these essential inputs, figuring out how best to tweak their design, reduce their cost, and increase their effectiveness. Creativity is especially important in community development, where the production of goods and services for people of limited financial means must be heavily subsidized out of public coffers and private contributions. Every dollar must be inventively stretched and cleverly invested for maximum effect.

* John Emmeus Davis (Ph.D., Cornell University) has been a leading practitioner, researcher, and advocate for community-led development on community-owned land since 1981, the year he joined a group of academics and activists in writing *The Community Land Trust Handbook*, a seminal text on the CLT. He went on to publish other books and articles about the model and to assist dozens of CLTs in the United States and in other countries. After ten years as director of housing in Burlington Vermont under Mayors Bernie Sanders and Peter Clavelle, he co-founded Burlington Associates in Community Development, a national consulting cooperative. He is a co-producer of *Arc of Justice: The Rise, Fall and Rebirth of a Beloved Community*, a documentary film tracing the CLT's origins in the southern Civil Rights Movement. Learn more at *www.burlingtonassociates.com* [https://perma.cc/78Z6-5S82] and *https://en.wikipedia.org/wiki/John_Emmeus_Davis* [https://perma.cc/9KWG-NJN8].

1. Some schools of economic thought add entrepreneurship, knowledge, technology, energy, or time to the list of essential inputs, but land, labor, and capital remain the "big three."

Land has been the glaring exception to the predilection for innovation in community development. Experimentation abounds when it comes to finding new ways to improve infrastructure, to incubate enterprises, to finance homeownership, or to train low-skilled workers. Far less ingenuity has gone into designing new ways of owning, controlling, and utilizing land to make distressed places more livable or to make prosperous places more inclusive.

This pattern has persisted despite the presence of an innovative model of community-owned land that has gradually spread across the United States, Australia, Belgium, Canada, and England. Known as the community land trust (CLT), this unconventional approach to place-based development has three distinguishing features: (1) a nonprofit organization, acting on behalf of a geographically defined community, acquires and retains scattered parcels of land that are put to a variety of socially desired uses through long-term ground leasing; (2) any residential or non-residential buildings located on these leaseholds are sold off to individual owners, either real persons or corporations, whose ownership interest is encumbered by long-lasting affordability controls over each building's use and resale; and (3) the nonprofit landowner is guided in the development of the lands under its care by the people who live on them and around them.

A shorthand description of this strategy, pursued by CLTs and by other nonprofit organizations operating in a similar fashion, would be *community-led development of individually owned buildings on community-owned land*. Or, shorter still, *common ground*.

Any sort of building can be raised on a foundation of community-owned land, although CLTs have devoted most of their resources to date to the production and preservation of affordable housing. On leased land, CLTs have developed many types of renter-occupied and owner-occupied housing, all priced within the financial reach of persons of limited means. But the forte of community land trusts is *stewardship,* taking care of this housing long after it is created. CLTs have been effective in preventing the disappearance of affordability when real estate markets are hot. They have been equally effective in preventing the erosion of owner equity, the neglect of necessary repairs, and the loss of homes to foreclosure when markets turn cold.

The documented success of CLTs in making such "counter-cyclical stewardship" a reality has not been enough to overcome the resistance of many practitioners in the field of community development, who have been slow to incorporate common ground into their own programs. The simplest explanation for their hesitancy is that doing

affordable housing and neighborhood revitalization on community-owned land is hard work, especially when a community's residents are given a say in deciding how land should be used. That can scare away the timid and give pause to even the boldest practitioner. Most choose an easier path. They sell off local lands. They shut out local voices. They roll out affordably priced housing that looks familiar to public funders and private lenders, while minimizing their own responsibility for preserving the affordability, quality, and security of these homes after they are built.

Choosing a path of least resistance is understandable, but short-sighted. It pays heed to the difficulties and demands of common ground, without looking closely into how it actually works and without weighing fully its larger and longer advantages vis-à-vis other place-based strategies. Community-led development of resale-restricted buildings on community-owned land is harder to do, but the extra effort is worth it.

This essay argues that common ground, as practiced by CLTs and by other nonprofits, is an especially effective strategy for promoting equitable and sustainable development in residential neighborhoods, be they urban, suburban, or rural. It is a platform for redistribution, putting property and power into the hands of people historically deprived of both. It is also a bulwark against loss, protecting hard-won gains that improve conditions, expand opportunities, and further fair housing for disadvantaged populations far into the future.

The case for common ground is presented here through a series of arguments that identify *what* practitioners strive to achieve with regard to equitable and sustainable development and *how* community-owned land can get them there. Some of these claims are closer to being working hypotheses or the kind of reasoning found in a lawyer's brief, than they are to being any sort of definitive proof. Community land trusts are simply too young, too small, and too few to render a final verdict on their performance.

Arguments for the superiority of community-led development on community-owned land are compelling nonetheless. They illustrate that land may be deployed as creatively as any other factor of production in doing place-based development. They suggest that community-owned land, in particular, may be transformative in ways that other strategies are not, creating places where justice is deepened and sustained. There are good reasons for giving common ground a try.

I. Common Ground: Origins and Obstacles

Community-owned land as a platform for place-based development is an old idea. As far back as 1898, Ebenezer Howard proposed an innovative ownership scheme for the Garden Cities he hoped to establish on the outskirts of England's older, industrial cities.[2] Houses, stores, orchards, and factories would be privately owned by individuals, cooperatives, or for-profit businesses, but the underlying land would be permanently owned and managed by a nongovernmental organization created expressly for that purpose. The land would never be resold. However, it would be put into the hands of many individuals through long-term ground leases, executed between the nonprofit landowner and any number of owners and operators of the new town's buildings and enterprises.

At the heart of Howard's vision was a radical proposition: the equitable development of place depends on the common ownership of land. Or, as a latter-day manifesto has put it, updating Howard for the 21st Century, "the Garden City owns itself."[3] Land was to be held and managed on behalf of *all* residents, rich and poor, present and future, enabling a community to guide its own development, to determine its own fate, and to capture for the common good most of the gains in land value that society had helped to create.

This commitment to common ground was the foundation on which the first Garden Cities were raised, starting with Letchworth in 1903 and Welwyn in 1919. It was the foundation for other reformist schemes of decentralized development as well, some influenced by Howard and some not, including the *eijdo* system in Mexico, the *Gramdan* villages of India, and the *kibbutzim* and *moshavim* of Israel.[4]

2. Ebenezer Howard, Garden Cities of To-Morrow 13 (Swan Sonnenshein & Co., 1902).

3. Philip Ross & Yves Cabannes, *21st Century Garden Cities of To-Morrow: A Manifesto* (Dec. 2014), www.newgardencitymovement.org.uk [https://perma.cc/S6UA-UDNC].

4. Each of these international precedents, where planned communities were established on a foundation of community-owned land, has an extensive literature all its own. Readers might begin with Lyman Tower Sargent, Utopianism: A Very Short Introduction (Oxford University Press, 2010); Dennis Hardy, Utopian England: Community Experiments 1900-1945 (Routledge, 2000); Henrik F. Infield & Koka Freier, People in Eijdos: A Visit to the Cooperative Farms of Mexico (Praeger, 1954); T.K. Oommen, Charisma, Stability and Change: An Analysis of Bhoodan-Gramdan Movement in India (Thompson Press, 2001); D. Weintraub, M. Lissak, & Y. Azmon, Moshava, Kibbutz, and Moshav: Patterns of Jewish Rural Settlement and Development in Palestine (University Press, 1969); S. Ilan Troen, Imagining Zion: Dreams, Designs, and Realities in a Century of Jewish Settlement (Yale University Press, 2003); *see also* Roots & Branches, http://greenfordable.com/clt/ (last visited July 18, 2016) [https://perma.cc/ZZ53-

The same idea of equitable development on community-owned land which had animated each of these international precedents was later incorporated into a homegrown model of community development in the United States: the community land trust (CLT). It, too, was founded on common ground, combining community ownership of land and individual ownership of buildings, while employing long-term ground leases to balance the interests of both parties.

American practitioners who pioneered and promoted the CLT may have inherited this mixed-ownership model from other countries, but they soon added organizational and operational features of their own, changing the model into something new. Organizationally, they structured community land trusts to ensure the continued accountability of the nonprofit landowner to the people and places it served.[5] Operationally, they designed the programs of community land trusts to ensure the continued affordability of any buildings on the nonprofit's lands, while protecting them against deferred maintenance or mortgage foreclosure if a building's owner were to hit hard times.[6]

Equally significant, the American model sidestepped what had always been the most daunting impediment to the real-world realization of Howard's grand vision. The promise of the CLT was that something resembling a Garden City could be launched right away. No one had to wait for the day when myriad acres of vacant land might be acquired on which to build a new town capable of accommodating thousands of families, homes, and enterprises. A CLT could start small and expand incrementally. It could grow through the construction of new buildings or it could concentrate on the rehabilitation of older

HVCP] (tracing the origins and evolution of the model, and providing more information on international and domestic precursors to the modern-day CLT).

5. Organizationally, the "classic" CLT, as promoted by the Institute for Community Economics during the 1980s, had an open membership and a three-part board, representing the interests of the people who live on the CLT's land, people who live within the CLT's service area, and institutions that serve that geography, including local government, churches, banks, businesses, and other NGOs. Institute for Community Economics, The Community Land Trust Handbook (Rodale Press, 1982).

6. *See* The Community Land Trust Reader, Lincoln Inst. of Land Policy (2010) (discussing key features of the CLT); *see also* The CLT Technical Manual, National Community Land Trust Network (Kirby White ed., 2011) available at http://cltnetwork.org/2011-clt-technical-manual/ (last visited Aug. 30, 2016) [https://perma.cc/N6AL-UJHY]. (Operationally, all CLTs continue to exert considerable control over the leaseholder's property. Contained in the ground lease are guidelines and limits on how the land may be used and developed. Additional lease provisions regulate the occupancy, upkeep, improvement, financing, behest, and resale of the leaseholder's buildings. These controls endure for a very long time, with the typical CLT ground lease lasting for 99 years.)

buildings, gradually weaving the CLT into the frayed fabric of a built environment already in place.

The CLT was premised, moreover, on a bottom-up approach to community development that was missing in most mixed-ownership models of the past. It was not "gentlemen of responsible position and of undoubted probity," as Howard had called them, who would be creating and governing a CLT, making all of the formative decisions about what land to buy and what infrastructure to build until some distant day when a "board of management" could be elected.[7] Participatory planning and direct democracy began on the day a CLT was organized, involving prospective leaseholders and proximate neighbors in the CLT's affairs long before the organization started looking for land. This was not development on behalf of a needy population inhabiting a particular neighborhood, dictated from above by a governmental body or by a benevolent provider of social housing. It was development from below, initiated and guided by a locality's own residents. Ownership and empowerment went hand in hand.[8]

Not all CLTs are alike. As the model spread, practitioners adapted features of the "classic" CLT to fit local conditions, priorities, and needs. Among the hundreds of CLTs in the United States, there can now be found many variations in how these organizations are structured, how their lands are utilized, and how development is done. There can also be found many variations in how the ground lease is crafted, with different CLTs setting different conditions for the occupancy, use, alteration, and resale of housing (and other buildings) located upon their land. Additional variations have arisen as CLTs have become better established outside the United States, each country adapting the model to fit its own laws and customs.

It is noteworthy, too, that many community development organizations in the United States that are *not* CLTs, either in corporate name or in organizational structure, are similarly committed to hanging onto the land beneath their projects and employing long-term ground leases to regulate both the land's use and the future af-

7. Howard, *supra* note 2, at 50–51.

8. These democratic, participatory features of the modern-day CLT were added to the mixed-ownership model that had originated abroad as a direct legacy of the Civil Rights Movement in the American South. Beginning with New Communities Inc. in 1969, prototype and inspiration for all the CLTs that followed, there was a clear link in the minds of early CLT organizers between the common ownership of land and the collective power of the people living on and around that land. JOHN EMMEUS DAVIS, *Origins and Evolution of the Community Land Trust in the United States*, *in* THE COMMUNITY LAND TRUST READER 3–47 (Rodale Press, 2010).

fordability and condition of any residential or non-residential buildings.[9] Ground leasing can now be found among community development corporations, community gardening associations, and resident-owned cooperatives in mobile home parks. Among the many affiliates of Habitat for Humanity, some three dozen have partnered with CLTs, building Habitat homes on leased land, or have created ground leasing programs of their own.[10] In Denver, the Urban Land Conservancy has made extensive use of ninety-nine-year ground leases in holding land under residential and commercial buildings in multiple neighborhoods, a strategy designed to preserve affordable housing, prevent displacement, provide jobs and critical services, and capture land gains resulting from public investment in transit-oriented development.[11] In New York City, the Cooper Square Mutual Housing Association created its own CLT in 1991 to hold the land beneath 21 cooperatively owned buildings, containing 328 affordably priced apartments and 24 storefronts, as a second line of defense in making sure this low-income housing would never be lost.[12]

9. My focus is on land that is *community* owned and on development that is *community* led, which necessarily excludes many worthy initiatives where ground leasing has been used to hold land and to preserve the affordability of housing. For instance, the public housing authority in Atlanta retained ownership of the land beneath a mixed-income community of 700 homes at West Highlands, using long-term ground leasing in the redevelopment of Perry Homes, a dilapidated, crime-ridden rental complex. West Highlands is a successful example of ground leasing and permanently affordable housing, but not of community-led development on community-owned land. NORTHWEST ATLANTA REDEVELOPMENT PLAN AND PERRY/BOLTON TAX ALLOCATION DISTRICT, *Revitalizing Northwest Atlanta with Sustainable Redevelopment*, http://investatlanta.com/wp-content/uploads/Northwest-Atlanta-Redevelopment-Plan.pdf (Nov. 2002) [https://perma.cc/7VM4-CC74].

10. John Emmeus Davis, *Braided Lives*, ROOFLINES (March 28, 2013) http://www.rooflines.org/3152/braided_lives_habitatland_trust_partnerships_bring_each_back_to_their_roots/ [https://perma.cc/J9E7-YHAL]; *see also* HABITAT FOR HUMANITY INTERNATIONAL, 2017 SHELTER REPORT, AFFORDABLE FOR GOOD: BUILDING INCLUSIVE COMMUNITIES THROUGH HOMES THAT LAST, (forthcoming 2017).

11. The Urban Land Conservancy functions like a citywide community land trust. Although it lacks the community membership and community-controlled three-part board of a "classic" CLT, ULC utilizes an intensive community engagement process in planning its projects. *See* Robert Hickey, *The Role of Community Land Trusts in Fostering Equitable, Transit-Oriented Development: Case Studies from Atlanta, Denver, and the Twin Cities*, LINCOLN INST. OF LAND POLICY (June, 2013), available at https://www.lincolninst.edu/pubs/2243_The-Role-of-Community-Land-Trusts-in-Fostering-Equitable—Transit-Oriented-Development [https://perma.cc/77LF-HQRE].

12. More about Cooper Square and the intersection of co-ops and CLTs can be found in Tom Angotti, *Community Land Trusts and Low-Income Multifamily Rental Housing*, LINCOLN INST. OF LAND POLICY (2007) available at https://www.lincolninst.edu/pubs/dl/1272_Angotti%20Final.pdf [https://perma.cc/Z77C-V2RN]; *see also* Meagan Ehlenz, *Community Land Trusts and Limited Equity Cooperatives: A Marriage of Affordable Homeownership Models*, LINCOLN INST. OF LAND POLICY (2014) available at https://www.lincolninst.edu/pubs/dl/

Despite these successes, neither the acceptance of community land trusts nor the utilization of long-term ground leasing has been widespread. The organizations that call themselves a CLT or act like a CLT presently number fewer than 300 in the United States.[13] The total acreage of community-owned land remains relatively small. Clearly, common ground is not winning many popularity contests.

No wonder. In a country where so many cultural norms, financial prerogatives, and institutional practices are weighted so heavily in favor of land being treated as a commodity, a model of community ownership that removes land permanently from the stream of commerce, while preserving the affordability of housing forever, seems downright strange. Equally unusual, most CLTs are committed to giving residents of their chosen service area a voice in determining how their lands will be developed and a vote in governing the organization itself. Community-led development of permanently affordable housing on community-owned land is not an easy concept for most Americans to grasp or to accept.

As hard as it may be to imagine, it can be even harder to implement. Public officials who fund affordable housing must be persuaded to use the dollars and powers at their disposal to build a portfolio of debt-free lands and resale-restricted homes under the permanent control of a community-based organization.[14] Instead of recapturing subsidies when a home resells and reverts to market pricing, moreover, public officials must be willing to allow these subsides to remain permanently in the home, lowering the price for successive buyers. Private lenders must be persuaded to mortgage homes on leased land, accepting the borrower's leasehold interest as partial security for the loan, relinquishing the right to seize the land should a mortgage go bad.[15] Municipal assessors must be taught how to value resale-re-

2485_1831_Ehlenz%20WP14ME1.pdf [https://perma.cc/J66N-WC5M] (discussing Cooper Square and the intersection of co-ops and CLTs).

13. Materials posted on the website in the "Publications Library" of the National CLT Network, now named the Grounded Solutions Network, contain various estimates of the number of CLTs in the USA. The "Program Directory" on this website lists 270 CLTs in the USA as of 2016. *Program Directory*, COMMUNITY LAND TRUST NETWORK available at www.cltnetwork.org/directory/ (last visited Oct. 18, 2016) [https://perma.cc/K6EW-2SF6].

14. Historically the hardest "sell" in winning support from public officials has been to convince them to make their subsidies directly available to the CLT as an *equity* investment in order to bring land into a CLT's portfolio unencumbered by debt and to lower, thereby, the purchase price of any buildings located on the CLT's land.

15. *See* Sarah Ilene Stein, *Wake Up Fannie, I Think I Got Something to Say to You: Financing Community Land Trust Homebuyers without Stripping Affordability Provisions*, 60 EMORY L.J. 209 (2011) (discussing how community land trusts may be used to maintain affordability).

stricted buildings on leased land.[16] Prospective homebuyers must be helped to understand why they are not allowed to purchase the underlying land and why so many limits will continue to encumber their home's current use and future resale.[17] The CLT's leaders must carefully educate and actively engage a neighborhood's residents, winning their support for the nonprofit's plan to hang onto land instead of selling it, while soliciting the participation of these same residents in planning for the land's development.

Common ground can be a tough slog down a muddy road. It is not for the faint of heart, demanding of practitioners an extra measure of tenacity to stay the course in the face of so many obstacles.[18] Nor, it must be said, is long-term ground leasing always the right tool for the job. There are clearly circumstances where another model or mechanism is going to be the better strategy for providing affordable housing or for promoting neighborhood revitalization.[19] There are also times when PLACE itself is the wrong strategy; that is, occasions when the perennial debate over programs that rebuild the neighborhoods where low-income people live versus programs that expand op-

16. *See* Alese Bagdol, *Property Taxes and Community Land Trusts: A Middle Ground*, 91 TEX. L. REV. 939, 946 (2013); *see also* John Emmeus Davis & Rick Jacobus, *The City-CLT Partnership: Municipal Support for Community Land Trusts*, Lincoln Inst. of Land Policy, 23–27 (2008) available at http://www.lincolninst.edu/pubs/1395_The-City-CLT-Partnership [https://perma.cc/YE7G-N2KR].

17. Disclosing all of the conditions that encumber a CLT home is a moral and legal necessity, ensuring the *informed* consent of prospective buyers. It is also a sound marketing strategy to take extra time and care in explaining how the model works, since much of the skepticism that prospective homebuyers have about buying a resale-restricted home tends to melt away as they come to understand the reasons and rewards behind the deal. *See* Emily Thaden, Andrew Greer, & Susan Saegert, *Shared Equity Homeownership: A Welcomed Tenure Alternative Among Lower Income Households*, 28 HOUSING STUDIES 1175–1196 (2013) available at http://www.tandfonline.com/doi/abs/10.1080/02673037.2013.818621 [https://perma.cc/Q7JN-36VH].

18. While I am willing to concede that it is often harder doing place-based development this way, I also believe that many practitioners exaggerate the difficulties and dismiss ground leasing out of hand without fairly weighing its advantages. *See* John Emmeus Davis, *Ground Leasing Without Tears*, SHELTERFORCE (Jan. 29, 2014) available at http://shelterforce.org/article/ground_leasing_without_tears/.%C2%A0 [https://perma.cc/AN4E-AUQY].

19. In cases where an organization's program is focused on neither neighborhood revitalization nor community empowerment, where an organization's portfolio is small, where its capacity is weak, or where it controls only a small number of resale-restricted condominiums in a multi-unit project, it may be prudent to use a deed covenant or a mortgage instrument instead of a ground lease—at least at first. There is always the option of *transitioning* to community-owned land and long-term ground leasing down the road as an organization's circumstances change or, as many CLTs have done, *combining* ground leasing with other mechanisms.

portunities for low-income people to move out must be resolved in favor of the latter.[20]

When placemaking is called for, however, whether to improve conditions for the precarious residents of a damaged locale or to provide affordably priced housing for protected classes in a prosperous locale, common ground is a strategy that is particularly effective, balanced, and fair.[21] There is a case to be made, as Ebenezer Howard argued long ago, that a community should own itself, taking control of its destiny by collectively holding and managing the land beneath its feet. There is a case to be made, as I shall argue, that by leasing out its land instead of selling it off, a community has a better chance of ensuring that the use of its land will result in outcomes more equitable in the near term and more sustainable over time. That is how the game of community development ought to be played. Common ground is in a league of its own.

II. Redistribution: The Pursuit of Equitable Development

Every investigation into whether place-based development is *equitable* should begin with the question that city planners ask less frequently than they should, a forensic question that is regularly asked by such street-level practitioners as police detectives or courtroom lawyers—*Cui bono*, who benefits? Equally relevant is the reverse—Who's harmed?

When new investment is brought into a neighborhood, when new housing is built, when social conditions improve and land values rise, the lion's share of the benefits may go either to people who are greatly in need or to people who already possess an abundance of property and power; conversely, the burdens of development may be

20. Elwood M. Hopkins & James M. Ferris, *Place-based Initiatives in the Context of Public Policy: Moving To Higher Ground*, Center on Philanthropy and Public Policy (March 2015) available at https://socialinnovation.usc.edu/2015/03/09/place-based-initiatives-in-the-context-of-public-policy-and-markets-moving-to-higher-ground/ [https://perma.cc/AZE9-2T6E] (providing a contemporary airing of the longstanding place-versus-people debate); *see also* Gregory Squires, *Place, Poverty and Politics: A Growing Divide*, Rooflines (May 20, 2015), Peter Dreier, *The Revitalization Trap*, Rooflines (Oct. 1, 2015) (both supplying an additional spirited conversation in blog format).

21. *Affirmatively Furthering Fair Housing*, 80 Fed. Reg. 42,272, 42,279 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, et al.). (The Final Rule endorses "a balanced approach [that] would include, as appropriate, the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, effective housing mobility programs and/or concerted housing preservation and community revitalization efforts . . . .") (This "balanced approach" is discussed in detail in *infra* note 46.).

apportioned fairly or fall disproportionately upon the shoulders of people who are least able to bear them. The plans, projects, and outcomes of place-based development are always found somewhere along the contested continuum between these poles. They tilt toward *redistribution*, challenging the existing landscape of inequality, or they tilt toward *reinforcement*, etching patterns of privilege more deeply into the social structure of residential neighborhoods.

Common ground is a mechanism for pursuing the former. It tips the scales in favor of people who have historically enjoyed few of the benefits of land-based wealth and exercised little power in shaping the trajectory of the neighborhoods in which they live. At the same time, common ground provides a mechanism for preserving this fairer distribution of property and power over time. In impoverished neighborhoods in need of revitalization, this allows investment to occur and development to proceed without the wholesale displacement of low-income households, low-profit enterprises, and beloved spaces that populated the area long before it began to improve. In prosperous neighborhoods in need of diversity and opportunity, this allows affordable housing to be created that has a better chance of lasting for many years. Common ground is the place where equitable development and sustainable development intersect.

A. Street Level Land Reform: The Economic Case for Common Ground

The community land trust is a hybrid form of land reform, combining three long-established strategies for redistributing landed resources from one class of owners to another to achieve a more equitable allocation of income and wealth. In its commitment to community-owned land, the CLT is part of a collectivist tradition of land reform in which large estates have been transferred intact to collectives, cooperatives, or village trusts.[22] In its commitment to the individual ownership of buildings, especially owner-occupied homes, the CLT is part of a distributionist tradition in which concentrated land-

22. While this tradition inevitably invokes violent images of Stalinist confiscation of the estates of a purged aristocracy, there are less draconian examples. The Gramdan Movement in India relied on voluntary donations of land from wealthy landlords in the 1950s. The contemporary land reform movement in Scotland relies on state funds, raised largely through the national lottery, and a 2003 law enacted by the national assembly in Edinburgh giving communities a first option to purchase the feudal estates on which they sit. John Bryden & Charles Geisler, *Community-Based Land Reform: Lessons from Scotland and Reflections on Stewardship*, *in* THE COMMUNITY LAND TRUST READER 475-495 (Lincoln Institute of Land Policy, 2010).

holdings have been broken up into smaller homesteads and put into the hands of families, farmers, and entrepreneurs. In its commitment to fair allocation of the appreciating value of real estate, gains in equity that would otherwise be pocketed by landowners, the CLT is part of a long tradition of value recapture that can be traced from the "social increment" theory of John Stuart Mill, through the Single Tax crusade of Henry George, to the Garden Cities of Ebenezer Howard.[23]

What is noteworthy about the CLT's approach to land reform is not only that it combines these three reformist traditions in a novel way; it also endeavors to redistribute land and land-based wealth at a different *level* than attempted in the past. Internationally, most land reform schemes have encompassed an entire country or, in Howard's case, an entire city created from scratch. By contrast, the community land trust is tailored to fit the geography and circumstances of a neighborhood, group of neighborhoods, small town, or a similar place-based community of smaller scale.[24] Even when serving a wider territory, most of the economic benefits of common ground are realized at the micro-level of neighborhood and household.

1. Neighborhood Economics

Across the ages, the rhetoric and practice of land reform have swung back and forth between a "negative" focus on stopping the predations of a landed elite, stripping them of assets to blunt their power, and a "positive" focus on improving the lives of the landless, putting arable land and affordable housing into the hands of a population long excluded from the economic and political mainstream.[25] CLTs have concentrated on the latter. The positive reform practiced by most CLTs has been designed to make land more widely available

23. An earlier attempt to situate the CLT within the context of different approaches to land reform can be found in John Emmeus Davis, *Reallocating Equity: A Land Trust Model of Land Reform*, LAND REFORM, AMERICAN STYLE 209–232 (Charles C. Geisler & Frank J. Popper eds., 1984).

24. Many CLTs that started out with a focus on a single inner-city neighborhood or single rural county have expanded their service areas in recent years. Even when serving a wider territory, however, most of the economic benefits of common ground are realized at the micro-level of household and neighborhood.

25. These are two sides of the same coin, of course. A prohibitionist agenda focused on stopping oppression, ending absentee ownership, and blocking real estate speculation is the flip side of a distributionist agenda aimed at moving land and land-based wealth into the hands of the have-nots. Two excellent introductions to the myriad forms that land reform can take are, PROMISED LAND: COMPETING VISIONS OF AGRARIAN REFORM (Peter Rosset et al. eds., 2006), and LAND REFORM, AMERICAN STYLE (Charles C. Geisler & Frank J. Popper, eds.,1984).

within their chosen service area for the kinds of uses that directly benefit low-income and moderate-income people. Most of this activity has been centered to date on expanding access to affordable housing. Homeownership, in particular, whether in single-family houses, townhouses, condominiums, or cooperatives, has been the priority of a majority of CLTs in the United States and elsewhere, although a number of CLTs are also heavily involved in developing multi-unit rental housing, SROs (single room occupancy), and homeless shelters.[26]

Beyond housing, lands owned by CLTs have been leased out for the development of community centers, day care centers, commercial buildings for neighborhood retail, and offices for other nonprofits. Agriculture has been an activity supported by CLTs as well. In rural areas, CLTs have been used to preserve access to productive lands for small farmers, with a CLT sometimes combined with a CSA (community-supported agriculture), linking those who grow food with those who consume it.[27] In urban areas, community-owned lands have been leased out for community gardens, greenhouses, and commercial farming.[28]

Common ground is a versatile foundation on which any type of building can be constructed and on which any use of land can be encouraged. Furthermore, any type of partner can be employed in developing, managing, or farming that land, including individuals or groups who want to build their own housing or start their own enterprises; cooperatives for producers or consumers; and even for-profit developers, builders, farmers, and entrepreneurs. Such versatility is essential whenever an organization's primary goal is not only to build as many residential units as possible, scattered across a wide geography,

26. *See generally* Maxwell Ciardullo & Emily Thaden, *Community Land Trusts Have Renters Too,* Rooflines (October 15, 2013) (discussing the involvement of CLTs in the production and preservation of rental housing); Maxwell Ciardullo, Community Land Trusts and Rental Housing: Assessing Obstacles to and Opportunities for Increasing Access (Feb. 2014) unpublished Masters thesis, University of Massachusetts Amherst, 2012) (on file with ScholarWorks@UMass Amherst).

27. Kirby White, Preserving Farms for Farmers: A Manual for Those Working to Keep Farms Affordable (Equity Trust, 2009); *see also,* Land for Good, Leasing Land to Farmers: A Handbook for New England Land Trusts, Municipalities, and Institutions (2012).

28. Greg Rosenberg & Jeffrey Yuen, *Beyond Housing: Community Land Trusts and Urban Agriculture and Commercial Development*, Lincoln Inst. of Land Policy (2012) (Lincoln Institute of Land Policy Working Paper, Lincoln) (on file with Lincoln Institute); Jeffrey Yuen, *City Farms on CLTs*, Lincoln Inst. of Land Policy, 1 4–8 (2014).

but to restore and revitalize a marginalized territory that a stratified economy has left behind.[29]

2. Home Economics

Advocates for community land trusts and for other organizations using ground leases often speak of "removing land" from the purchase price of a home. What they mean is that subsidies granted by public agencies or private donors have been used to bring debt-free land into a CLT's portfolio. Because of this equity investment, the CLT is able to sell homes for an "affordable" price that covers just the cost of constructing or rehabilitating them. Not only does this result in a lower purchase price, it also results in a lower loan-to-value ratio. The latter can increase the likelihood of lower-income households being able to qualify for a private mortgage; it can also eliminate the requirement for private mortgage insurance if they do qualify, further reducing their monthly costs.

It cannot honestly be said that "removing the land" is the only way to secure these economic benefits. Any subsidies that are structured as grants rather than loans will have the same effect. They will close the affordability gap and reduce a homebuyer's costs, regardless of whether the subsidies are locked into the deal via a ground lease or via some other contractual mechanism. There are, however, three significant advantages that ground leasing has over other mechanisms when it comes to increasing and sustaining household wealth.[30]

First, common ground is an effective shield against financial shocks that can strip low-income homeowners of the prosperity they thought might finally be theirs, providing an operational and organizational umbrella that protects a homeowner's equity against loss. As will be argued in more detail later on when considering sustainable development, ground leasing provides superior stewardship by committing a steward to closer vigilance and surer intervention in times of

29. Common ground gives a nonprofit not only the ability to tailor the use of a neighborhood's land to meet a variety of current needs, but also the flexibility to adjust the uses of its lands and buildings in the future, accommodating changing needs, a changing economy, or the changing priorities of its principal funders.

30. There is another, smaller economic advantage that might be mentioned. In some jurisdictions, a large parcel of land on which multiple dwellings are to be constructed is not required to go through a lengthy and costly subdivision process if the land underneath these buildings is leased rather than deeded. Assuming that the savings that result from *not* having to subdivide the land are passed along to the eventual buyers of the finished homes, rather than retained by the developer, ground leasing will bestow a financial benefit on each buyer in the form of a lower purchase price.

trouble. That protection necessarily extends to covering the precious investment that low-income families have made in their resale-restricted homes. Stewardship is not only about preserving affordability for the next generation of home*buyers*; it is also about preserving the hard-earned equity of the present generation of home*owners*.

A painful lesson of the Great Recession, starting in 2007, was that personal wealth, when embedded in residential real estate, is less secure than supposed. Indeed, homeownership itself was revealed to be less secure. You only earn wealth if you can hang onto your home, which many owners of market-rate homes could not when the recession hit and the housing market collapsed. Between 2007 and 2012, 12.5 million homes went into foreclosure. Communities of color bore the brunt of it, due in large measure to the higher incidence of homes owned by African Americans and Latinos that were mortgaged using high-priced, variable-rate subprime loans.[31]

Their counterparts in resale-restricted homes fared much better, experiencing rates of default and foreclosure during the worst of the Great Recession as low as a tenth of the rate reported by the Mortgage Bankers Association for the owners of market-rate homes.[32] What the former had that the latter did not was a third party that stood protectively between them and their lenders, at both the front end and back end of the lending process. There was someone by their side to review and to approve proposed mortgages, preventing burdensome payments on predatory terms. There was someone to intervene should the owners of resale-restricted homes get behind in their payments, thereby reducing the incidence of mortgage foreclosure and preventing the loss of household wealth.

31. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 American Sociological Review 629, 633 (2016) (exposing evidence for the disparate impact of the mortgage crisis on communities of color); Debbie Gruenstein Bocian, Wei Li, Carolina Reid, & Roberto G. Quercia, *Lost Ground, 2011: Disparities in Mortgage Lending and Foreclosures*, Center for Responsible Lending (2011); *see also* Debbie Gruenstein Bocian, Peter Smith, & Wei Li, *Collateral Damage: The Spillover Costs of Foreclosures*, Center for Responsible Lending 1, 2 (2012); and Peter Dreier, Saqib Bhatti, Rob Call, Alex Schwartz, & Gregory Squires, *Underwater America: How the So-Called Housing Recovery Is Bypassing Many Communities*, Haas Institute (2014).

32. Emily Thaden, *Stable Homeownership in a Turbulent Economy: Delinquencies and Foreclosures Remain Low in Community Land Trusts*, Lincoln Inst. of Land Policy, (Lincoln Institute of Land Policy Working Paper, Lincoln) (on file with Lincoln Institute) (2011); *see also* John Emmeus Davis & Alice Stokes, *Lands in Trust, Homes That Last: A Performance Evaluation of the Champlain Housing Tract*, Community Wealth (2009) http://community-wealth.org/content/lands-trust-homes-last-performance-evaluation-champlain-housing-trust [https://perma.cc/K346-KM8D].

This safety net for low-income homeowners has proven to be an enormous economic advantage for people hoping to build wealth through homeownership, especially in communities of color. Structural racism in mortgage lending has fluctuated over several generations between starving these communities of needed capital and force-feeding them a diet of high-cost, variable-rate loans that make housing a risky investment. Community land trusts, in this regard, provide a tool not only for expanding homeownership, but also for sustaining it, along with the homeowner's investment. A recent report published by the Baltimore Housing Roundtable summarized this multi-faceted approach to wealth building:

> Today, in a tight credit market, loans made to Black families have declined by 83% and in Baltimore Black households receive less than a quarter of new mortgages despite being the majority of the population. CLTs with lower transaction costs, affordability protections, and supportive services provide Black communities the much deserved opportunity to obtain financing, build equity, and sustain their investments in neighborhoods at a time when traditional lending avenues have been significantly restricted.[33]

A second economic advantage of community-owned land is the opportunity it creates for capitalizing a stewardship fund to help the owners of resale-restricted homes to bear the future cost of major repairs. A small charge is now being added to the monthly lease fee collected by many CLTs, which is either deposited into a separate reserve for each home or aggregated into a pooled reserve for the portfolio as a whole.[34] These escrowed increments, essentially forced savings, are a boon for low-income homeowners down the road, when predictably confronted by a major capital expense like replacing a roof or furnace, rebuilding a chimney, or rehabilitating some other big-ticket system.[35]

33. Peter Sabonis & Matt Hill, *Community + Land + Trust: Tools for Development Without Displacement*, BALTIMORE HOUSING ROUNDTABLE 28 (2016) http://www.baltimorehousingroundtable.org/publications [https://perma.cc/FCV6-C3BW].

34. It should be noted that some homeownership programs using deed covenants have also begun collecting monthly "stewardship fees" from their homeowners. It is less obvious how defensible they would be, however, either legally or politically, were the owners of such resale-restricted homes to challenge this extra charge, unless collected as part of a condo association fee.

35. New banking laws in the United States have made it difficult for a mortgagee to escrow payments beyond those covering the mortgage, taxes, insurance, and association or lease fees. Nonprofit organizations like Habitat for Humanity that offer mortgages are similarly impeded from collecting extra fees that might be used in building up a maintenance and replacement reserve. When such a "stewardship fee" is part of a ground lease fee, however, it is more likely to be allowed, as long as a Habitat affiliate is not only the mortgagee but also the owner and lessor of the land underneath a Habitat home. This opportu-

Finally, community land trusts have shown themselves to be unusually effective at capturing and distributing land-based wealth intergenerationally. They do so by preventing the removal of public and private subsidies invested in the individually owned housing sited on their lands and by limiting the amount of appreciation the owners of such housing may pocket for themselves when reselling houses, townhouses, condominiums, or shares in a limited equity housing cooperative.[36] Subsidies and gains that are retained in a home reduce its price for subsequent buyers, in effect sharing land-based wealth between one generation of homeowners and another. This audacious feat of redistribution, achieved through a pricing formula and preemptive option embedded in the ground lease, puts the CLT squarely within the land reform tradition of value recapture that was pioneered by Henry George and Ebenezer Howard, with a street-level focus that was contemplated by neither.

B. Empowerment of Community: The Political Case for Common Ground

A particular strength of community-owned land is not only the diversity it allows in *what* is developed and *how* development is done, but the opportunity it allows a place-based community to impose its will on both, making collective decisions about the common good. As Harry Smith has said about the CLT created in Boston by his own organization, the Dudley Street Neighborhood Initiative, "The land trust doesn't exist just to acquire and manage land. It's really about engaging community to decide together what they want on their land."[37]

Land that is community-owned provides a foundation for development that is community-led. This is more than simply opening up a developer's planning process to community participation, inviting residents to voice opinions about the kind of improvements needed to make their neighborhood nicer, safer, or more affordable. A non-

nity has helped to persuade a number of Habitat affiliates in the U.S. to add ground leasing to their program mix.

36. Davis & Stokes, *supra* note 32; and *see* Kenneth Temkin, Brett Theodos, & David Price, *Shared Equity Homeownership Evaluation: Case Study of Northern Communities Land Trust*, THE URBAN INST. 1, 16 (2010) (providing evidence for the CLT's effectiveness in preventing the wholesale removal of subsidies and gains, thereby keeping home prices within the reach of subsequent low-income homebuyers, can be found in).

37. Penn Loh, *How One Boston Neighborhood Stopped Gentrification in Its Tracks*, YES! MAGAZINE (Jan. 28, 2015) http://www.yesmagazine.org/issues/cities-are-now/how-one-boston-neighborhood-stopped-gentrification-in-its-tracks [https://perma.cc/3LMF-A3ZJ].

profit organization that owns and manages leaseholds has a head start on creating a place-based constituency that is capable of defending and advancing the interests of all who call a neighborhood their home. It also has a built-in incentive to heed the stated concerns of people who live on and around its holdings.

That is *not* to say that all nonprofits doing ground leasing are equally committed to sharing power with residents of their service area, nor that all of them are actively engaged in organizing residents for collective action.[38] It *is* to say that CLTs in their "classic" form *presume* a place-based constituency and an inclusive structure of governance, both regarded as best practices within the wider CLT world. Even when a nonprofit landowner lacks one or more of the democratic elements of the "classic" CLT, moreover, the long-term leasing of community-owned land sneaks empowerment through the backdoor, introducing a political dynamic that other mechanisms for keeping housing affordable often lack.

1. Sharing Power

Among many nonprofits doing community development, there has been a noticeable decline over the past few decades in the number that assiduously incorporate participatory strategies and structures into their organizations and operations. Too many have drifted away from what used to be an article of faith among nonprofit organizations helping to house low-income people or to revitalize low-income neighborhoods; namely, a core belief that the beneficiaries of an organization's projects and services should have a voice in planning those activities and in guiding and governing the organization that carries them out.[39]

An organization's philosophical commitment to democratic governance may help to arrest that slide, although that is hardly unique

38. Even among community land trusts, not all are equally committed to keeping the "C" in CLT. For some, empowering community is a lesser concern than providing housing. *See* Jeffrey S. Lowe & Emily Thaden, *Deepening stewardship: resident engagement in community*, 37 Urban Geography 611, 611–13 (2016); Emily Thaden & Jeffrey S. Lowe, *Resident and Community Engagement in Community Land Trusts*, Lincoln Inst. of Land Policy (Lincoln Institute of Land Policy working paper) (on file with Lincoln Institute) (2014); *see also* Karen A. Gray & M. Galande, *Keeping "Community" in a Community Land Trust*, 35 Social Work Research, 241, 241–42 (2011).

39. This is a personal observation, though I am hardly alone in noticing a decline in the number of community development organizations that give more than lip service to principles of participation and empowerment. *See, e.g.,* Randy Stoeker, *The CDC Model of Urban Development: A Critique and Alternative*, The Community Development Reader 361–368 (James DeFilippis et el. eds., 2d ed. 2012).

to organizations using ground leases. What *is* unique to ground leasing is the practical necessity of anticipating and managing the risk of leaseholder discontent. Landowner-leaseholder relations are not always smooth. Indeed, they can become downright bumpy, an ever-present possibility in the dual-ownership intricacies and intimacies of ground leasing. A desire to reduce the severity of these clashes and to protect its own reputation in the larger community can be strong incentives for a nonprofit landowner to create a structure and culture for leaseholder engagement.

Cost may be part of this calculation. The least expensive stewardship regime is one in which compliance is routine and enforcement is unnecessary, one in which the occupants of price-restricted buildings police themselves, voluntarily abiding by the contractual conditions that encumber their homes. Compliance with these restrictions is more likely when the people whose homes are encumbered are given a voice in directing the activities of the organization that is managing the land beneath their feet and overseeing the buildings in which they live.

It is much harder, in short, for a nonprofit landowner to ignore the wishes of those who, by virtue of occupying its land, have a personal stake in making sure the lessor is responsibly managed and responsively attuned to the leaseholders' needs. The easiest way for a nonprofit organization to ensure that its beneficiaries are cheerleaders rather than critics is to make them partners in guiding and governing the organization itself.

2. Building Power

A nonprofit doing ground leasing cannot confine its activities to being a developer; it must be an educator and organizer as well. That is not only because its leaseholders may sometimes insist on their "landlord" entering the fray on their behalf, but also because the difficulties that accompany this unfamiliar form of tenure make it *necessary* for a nonprofit lessor to build awareness and acceptance at the same time it is building housing. The very things that make ground leasing harder to implement and to manage tend to force a nonprofit doing ground leasing to behave (at times) like a community organizer and to use (on occasion) whatever power it has accumulated to defend the interests of its leaseholders, its community, and itself.

To be successful as both a steward and a developer requires a CLT also to be an effective organizer. These activities are complementary, an argument forcefully made by Nora Lichtash in describing the

CLT program operated by her own organization, the Women's Community Revitalization Project in Philadelphia:

> Your funders think you should be doing one or the other, but it's not good for CLTs to be separated from organizing. . . . You're building your capacity, not just to do your present work, but for future work. . . . When you organize, you're respected because you have people power.[40]

Building power for a CLT begins with the "captive audience" of the organization's own leaseholders. As Jesse Myerson recently observed, "[l]and removed from the private market, de-commodified and placed under the ownership and management of the people who live there, is land that creates and renews its own political constituency."[41] This is a constituency that is helped to grow by the versatility of ground leasing, where anything can be developed or done on community-owned land. The political reality in most locales is that there tends to be only a small cadre of "housers" who vocally care about affordable housing. Common ground, however, can serve as a platform for many different kinds of development. When a nonprofit organization takes full advantage of this versatility, shopkeepers, service providers, and community gardeners are added to the ranks of leaseholders, broadening the base of a CLT's support.

3. Wielding Power

The model ground lease widely used by community land trusts gives the lessor the right to intervene on behalf of a building's owner to remove liens (Article 7.4), to contest unfair property taxes (Article 6.3), and "to prosecute or defend, in its own or the Homeowner's name, any actions or proceedings appropriate to the protection of its own or Homeowner's interest in the Leased Land" (Article 14.7). It also requires the use of mortgages that give the lessor the right to intervene in the event of default (Article 8.4).[42] While an affordability covenant may be crafted to grant similar rights to a covenantee, this is less commonly done. On occasions when it is done, however, when nonprofit organizations or public agencies retain rights like these as part of their oversight of homes they have developed or subsidized, a

40. Miriam Axel-Lute & Dana Hawkins-Simons, *Organizing and the Community Land Trust Model*, SHELTERFORCE (Oct. 15, 2015) http://www.shelterforce.org/article/4279/organizing_and_the_community_land_trust_model/ [https://perma.cc/FY58-HXK4].

41. Jesse A. Myerson, *How To Get Rid of Your Landlord and Socialize American Housing, in 3 Easy Steps*, THE NATION (Dec. 8, 2015) https://www.thenation.com/article/how-to-get-rid-of-your-landlord-and-socialize-american-housing-in-3-easy-steps/ [https://perma.cc/8FHM-5JWH].

42. White, *supra* note 27.

practical question must be asked: Will an organization holding a bushel of arms-length covenants be as likely to intervene on behalf of the people living in "its" homes as an organization holding parcels of land beneath a portfolio of houses, townhouses, condominiums, or cooperatives? The answer, I would argue, is "no." The latter is committed in a way the former is not. A nonprofit lessor is more likely to wield whatever power it has in order to protect homes that are sited upon its own land—an argument that will be discussed in greater detail below, when considering the operational case for common ground.

There is also the matter of what "weapons" an organization has ready at hand should it choose to make that fight. Covenants, liens, and leases all give a nonprofit steward the power to control what happens to lands and buildings under its immediate control, but only ground leasing gives a steward the power to influence what happens to properties that *surround* its holdings. In nearly all jurisdictions, landowners are automatically notified by municipal agencies of proposed changes in municipal zoning, public investment, or private development slated for properties abutting their holdings. These landowners are formally invited to comment in public hearings about such proposals, and they are automatically granted legal standing in any regulatory or judicial disputes pertaining to abutting properties. By contrast, an organization that holds an affordability covenant or a mortgage lien is not likely to receive such notifications, nor to have legal standing in hearings or disputes before a planning commission, a zoning board, or civil court when deliberations involve properties beyond its own.

"All power comes from the land," as Charles Sherrod has described his own motivation in helping to create New Communities, a CLT prototype that emerged out the civil rights struggle in Albany, Georgia during the 1960s.[43] That sentiment was widespread among the visionaries and activists who established the earliest CLTs, first in rural areas and then in cities. For them, ownership and empowerment were inseparable, each seen as being a condition for the realization of the other. They structured their organizations accordingly, believing

43. This quote is contained in an interview with the Reverend Charles Sherrod in the filmed documentary ARC OF JUSTICE: THE RISE, FALL AND REBIRTH OF A BELOVED COMMUNITY (Open Studio Productions, 2016); *see* ARC OF JUSTICE: THE RISE, FALL, AND REBIRTH OF A BELOVED COMMUNITY, www.arcofjusticefilm.com (last visited Oct. 22, 2016) [https://perma.cc/AAY8-FU3X] (providing supplementary materials with additional context and background for events depicted in the film).

that a growing supply of community-owned land and an increasing number of homes on long-term leaseholds made it necessary, practically and politically, for a nonprofit landowner to have a place-based membership and a balanced board, to broadly represent the diverse interests of the community served.

This connection between ownership and empowerment has endured, even among CLTs that have relaxed or abandoned elements of the "classic" CLT in structuring their own organizations. That is due, in part, to the guiding principles subscribed to by most individuals who consider themselves members of the wider CLT community in the United States.[44] For these practitioners, expanding the power of disadvantaged communities to shape the trajectory of their own development is as important a purpose in doing their work as expanding the supply of community-owned land.

But there are also influences more practical than aspirational which explain the propensity of many CLTs to be as interested in redistributing power as in redistributing property. Community-owned land and long-term ground leasing, as I have suggested, create obligations that tug a nonprofit landowner toward sharing, building, and wielding power on behalf of the community it serves. There are certainly CLTs that resist that pull, but few CLTs completely ignore it.

C. Development With Justice: The Preservationist Case for Common Ground

"Community development occurs," according to James DeFilippis and Susan Saegert, "when the conditions of surviving and thriving in a place are not being supplied by capital."[45] Most place-based development is aimed at aggressively rebuilding *impoverished* localities in which an absence of investment has caused conditions inimical to surviving and thriving for all residents. But place-based development may also be aimed at *prosperous* localities, affirmatively furthering fair housing in areas where an abundance of investment (combined, perhaps, with a pernicious dose of discriminatory zoning) has elevated land val-

44. See, for example, the "guiding principles" put forward in February 2016 by the Grounded Solutions Network (http://groundedsolutions.org/) that are said, along with a common history and a distinctive set of best practices, to differentiate the "community of practice" of CLTs from other models and mechanisms promoted by the Network. *Concept Paper for a Community Land Trust: Community of Practice* (Feb. 8, 2016), *available at* http://www.bacclt.org/wp-content/uploads/2016/05/CLT-Community-of-Practice-v2.pdf [https://perma.cc/YM76-WFGW].

45. James DeFilippis & Susan Saegert, *Communities Develop: The Question is, How?*, THE COMMUNITY DEVELOPMENT READER 1, 5 (Routledge, 2012).

ues and left little room for housing that is affordable, effectively excluding the poor, people of color, and other protected classes. Equitable development is not only about lifting up the worst places; it is also about opening up the best places.[46]

In both situations, the special dilemma for practitioners committed to producing equitable outcomes is how to protect redistributive gains achieved in the present against their steady erosion and eventual elimination by market forces in the future; even more, how to avoid inadvertently accelerating that process by a practitioner's own success in turning a neighborhood around. The preservationist case for common ground addresses this dilemma head-on, arguing that common ground provides a foundation for equitable development *and* sustainable development, enabling the intersection and implementation of both.[47]

1. Do No Harm

Too rarely do public agencies, private foundations, and community developers of every stripe *plan for success* when endeavoring to improve distressed neighborhoods. Focused so desperately on doing something good for places and residents urgently in need, they provide only the flimsiest protection against the possibility of something bad happening down the road.[48] It is almost as if these well-meaning interventionists had become so accustomed to failure that they cannot imagine a day when their own efforts might cause property values to

46. This is also what fair housing should be "about," according to the Final Rule on *Affirmatively Furthering Fair Housing* This directive recognized that a "balanced approach" might be needed to address fair housing issues in both kinds of places, including "the removal of barriers that prevent people from accessing housing in areas of opportunity, the development of affordable housing in such areas, effective housing mobility programs and/or concerted housing preservation and community revitalization efforts." *Affirmatively Furthering Fair Housing*, *supra*, note 21, at 42, 279.

47. The broadest definition of a "preservationist" would be a person (or organization) concerned with the preservation of biological species, wildlife habitats, historic sites, or other endangered features of the natural or built environment. Common ground can be called a "preservationist" strategy by dent of its focus on perpetuating affordable housing, third spaces, and redistributive gains constantly endangered by market forces.

48. Many churches that minister to low-income renters in disadvantaged areas have been equally heedless, ignoring the rising tide of market forces that can hollow out their congregations when a neighborhood undergoes gentrification. As Bob Lupton has pointed out, these churches eventually face a difficult choice: "If they remain committed to the poor, they must decide to either follow the migration streams as they gravitate to the periphery of the city, or get involved in real estate to capture affordable property in their neighborhood to ensure that their low-income neighbors retain a permanent place." Bob Lupton, *Gentrification with Justice*, byFaith, (June 1, 2006) http://byfaithonline.com/gentrification-with-justice/ [https://perma.cc/4ATU-F6K3].

rise and market pressures to mount, threatening the security and well-being of the disadvantaged population they set out to help.

Planning for success when *equitable* development is the goal begins by honestly acknowledging the pain that place-based development can sometimes inflict on economically precarious people and accepting responsibility for doing something to prevent it.[49] By that light, any funder or practitioner who intervenes in a low-income neighborhood with the intention of bettering the lives of those who live there should approach such places with a caution and humility akin to that embodied in the Hippocratic Oath: "I will take care that they suffer no hurt or damage."[50]

One of the surest ways of taking care is for a community to "Take a Stand, Own the Land," as the organizing slogan of the Dudley Street Neighborhood Initiative (DSNI) once put it.[51] In the 1970s, residents of the Boston neighborhood of Roxbury welcomed the prospect that transit-oriented development might soon be attracting investment into an area that had experienced decades of redlining, abandonment, and arson for profit. But they also worried that rising rents and housing prices might follow in its wake, steadily displacing families with limited incomes and elders on fixed incomes. The solution championed by DSNI was to begin acquiring a significant percentage of the neighborhood's land *before* it was bought up by private speculators and caught up in market forces that the government's investment in infrastructure had helped to unleash. Equally important, DSNI had the foresight to realize that acquiring land was not enough. This land, and what was raised upon it, had to be permanently removed from the market. A community land trust subsidiary named Dudley Neighbors Inc. was established by DSNI in 1979 to own the land forever and to preserve the affordability of rental housing, cooperative housing, and

49. Tony Pickett, *Stop Talking About Displacement*, Rooflines (Feb. 5, 2016) http://www.rooflines.org/4384/stop_talking_about_displacement/ [https://perma.cc/47JK-WE4V] ("Any veteran community development practitioner must acknowledge the dual responsibility of creating neighborhood improvements while also managing the potential of those same improvements to change market perceptions that attract new higher income "urban pioneers" who often precede displacement.").

50. MedicineNet.com, *Definition of Hippocratic Oath*, http://www.medicinenet.com/script/main/art.asp?articlekey=20909 (last visited Oct. 23, 2016) [https://perma.cc/82JU-KLP2].

51. The story of DSNI is told by Peter Medoff & Holly Sklar, Streets of Hope: The Fall and Rise of an Urban Neighborhood (South End Press, 1994).

owner-occupied houses, duplexes, and triplexes being planned for construction on DNI's land.[52]

A similar strategy has been pursued in the Tenderloin neighborhood of San Francisco, where a long-standing partnership between municipal agencies and nonprofit providers of affordable housing has resulted in a steady stream of land being moved into social ownership over the span of many years:

> Starting in the 1970s and continuing uninterrupted over the decades since, Tenderloin activists, working with city government and a set of strong nonprofit partners, bought or otherwise obtained control over a significant share of the area's real estate. . . . It's a "win-win" strategy that could be dismissed as wishful thinking in any other contested neighborhood. But in the Tenderloin, community control of land makes it possible for community leaders to risk improving the neighborhood without worrying that new investment will push out all the low income people. . . . In fact, this strategy of steady land acquisition and permanent affordability controls is probably the only approach to combating gentrification that can actually win.[53]

Community-owned land cannot keep market forces from buffeting a neighborhood, any more than an umbrella can stop the rain. It cannot prevent affluent people from moving into a low-income area that is newly attractive to homebuyers and entrepreneurs who, sensing a change in the area's fortunes, are now willing to settle their families or businesses there.[54] What community-owned land *can* do is to keep the poor from getting drowned in the deluge. It is a bulwark against displacement, protecting clusters of affordable housing that funders

52. *See generally* Robert Hickey, *The Role of Community Land Trusts in Fostering Equitable, Transit-Oriented Development: Case Studies from Atlanta, Denver, and the Twin Cities*, LINCOLN INST. OF LAND POLICY, (Lincoln Institute of Land Policy working paper) (on file with Lincoln Institute) (2013) (examining other cities where CLTs have been promoted as a preservationist strategy vis-à-vis massive public investment in infrastructure).

53. Rick Jacobus, *The Gentrification Vaccine*, ROOFLINES, (Aug. 13, 2015) http://www.rooflines.org/4211/the_gentrification_vaccine/ [https://perma.cc/D4Q9-J8TN]; *see also* RANDY SHAW, THE TENDERLOIN: SEX, CRIME, AND RESISTANCE IN THE HEART OF SAN FRANCISCO (Urban Reality Press, 2015) (It is not only the tenure of land that has "saved" the Tenderloin, but the tenacity of grassroots organizing.).

54. Putting aside the dubious question of whether it is really in the best interests of low-income residents to preserve geographic concentrations of poverty, even to the point of preventing all in-migration by more affluent households, there is probably no way realistically for a CLT to do it. There are few inner-city neighborhoods or rural villages where the *bulk* of the locality's land is ever going to be owned by a nonprofit organization acting to protect a community's more vulnerable residents. At a deeper level, Alan Mallach has expressed concern about "any racial, ethnic, social, or economic group" controlling most of a neighborhood and using "social ownership" to exclude other groups. *See generally* Allan Mallach, *Hung Up on Gentrification? Don't Be*, ROOFLINES (July 16, 2013) http://www.rooflines.org/3320/hung_up_on_gentrification_dont_be/ [https://perma.cc/6K7J-QUCG].

and practitioners have worked so hard to create; preventing precious, precarious islands of security, mutuality, and opportunity from being washed away.[55]

This is different than viewing common ground as a so-called inoculant against gentrification. Protecting the security and affordability of "islands" set aside for low-income households should be a higher priority than preventing the in-flow of moderate-income or even upper-income people into neighborhoods with high concentrations of poverty. Gentrification as an *outcome* is worth stopping, since that usually entails the massive removal of all lower-income people who previously inhabited a neighborhood. But gentrification as a *process* may be worth allowing, *if* it is carefully managed (a) to regulate the type and pace of new development, (b) to protect vulnerable populations against displacement, and (c) to allow disadvantaged people to share in the benefits of living in a neighborhood that is attracting new investment and adding a mix of incomes. Few other strategies can match the efficacy of community-owned land in accomplishing all three, making the process of gentrification less painful and more equitable.

Affordable housing is not the only "lower" land use that is threatened when neighborhoods improve. The same is true for many non-residential land uses that serve or employ people of modest means. Common ground can be a bulwark here as well. A community-based organization that holds land under a variety of buildings and leases out land for a variety of purposes can prevent the loss of small manufacturers, retail establishments, artist spaces, community facilities, and open lands that are put under pressure whenever real estate

55. The danger of being pushed aside as a community's land grows more valuable is especially acute in informal settlements in the United States and elsewhere. In many of these squatter communities, people have become deeply rooted over several generations, even to the point of constructing permanent dwellings. But they have no legal right to occupy the land. They have no security of tenure. Community land trusts have been proposed as a possible strategy for securing the homes of squatters through long-term leaseholds. In San Juan, Puerto Rico, the first large-scale test of this strategy is underway. Over 25,000 people occupy 200 acres along the Martin Pena Canal, most of whom have neither a deed nor a lease for the land on which they live. The Cano Martin Pena Community Land Trust, an initiative sponsored by the Corporación del Proyecto ENLACE del Cano Martin Pena, has won title to much of this land and is working to establish security of tenure for the squatters. Recognized as being a replicable model with potential applicability to informal settlements across the globe, the Cano Martin Pena CLT won the 2015-2016 World Habitat Award from the Building and Social Housing Foundation in England. BUILDING AND SOCIAL HOUSING FOUNDATION, *Cano Martin Pena Community Land Trust*, https://www.bshf.org/world-habitat-awards/winners-and-finalists/cano-martin-pena-community-land-trust/ (last visited Oct. 22, 2016) [https://perma.cc/A6CX-TT6S].

values rapidly rise. It can preserve cooperatively owned enterprises whose members may be tempted to "demutualize" if the enterprise thrives.[56]

Especially vulnerable in neighborhoods that are undergoing a rapid improvement in their fortunes are sites that Ray Oldenburg has called "third places."[57] These are informal, celebratory spaces in which neighboring occurs and community happens. Yuen and Rosenberg argue that the most endangered of these spaces, within neighborhoods with large concentrations of lower-income people, are community gardens:

> The third places of lower-income neighborhoods do not always get a lot of press, but serve important community functions such as establishing a sense of place, fostering broad and inclusive social interactions, and supporting civic engagement. They can take a variety of forms, such as bars, religious institutions, community centers, barbershops, and even simple building stoops. But few of these informal hangouts can activate a space and create an engaged constituency quite like the community garden.[58]

When a neighborhood is economically depressed, the supply of land for community gardens is often cheap and plentiful. When the neighborhood rebounds and land values rise, sometimes as a direct result of public investment or as an indirect result of residents cleaning up vacant lots and planting verdant gardens, third spaces devoted to urban agriculture are among the first to go. Public ownership can be flimsy protection, as community gardeners in New York City discovered in 1999 when Mayor Rudy Giuliani wanted to auction off 114 city lots beneath thriving community gardens. Community ownership offers greater security.[59]

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56. A rise in the value and profitability of a cooperatively owned enterprise can tempt the owners of the firm's shares to sell out to an outside buyer, removing the cooperative structure and reaping personal gains, a process known as "demutualization." Just as the leased land beneath a limited equity housing cooperative can prevent its conversion to a market-rate cooperative or condominiums, ground leasing underneath a worker cooperative or consumer cooperative can give a CLT (or other nonprofit landowner) the ability to prevent demutualization.

57. Ray Oldenburg, The Great Good Place 14 (Paragon House, 1st ed. 1989).

58. Jeffrey Yuen and Greg Rosenberg, *Hanging on to the Land*, Shelterforce, Nat'l Housing Inst. (Feb. 11 2013) http://www.shelterforce.org/article/3068/hanging_on_to_the_land/ [https://perma.cc/NE75-CACL].

59. It cannot be assumed that the highest priority for a community's residents—or for a nonprofit landowner representing their interests—will always be the preservation of open space. Darrin Nordahl offers the example of a neighborhood in Chicago where NeighborSpace was unsuccessful in developing an urban agriculture demonstration project because residents wanted housing to be developed on the vacant site. *See* Darrin Nordahl, Public Produce: The New Urban Agriculture 62–63 (Island Press, 2009).

In sum, common ground can serve as a durable protection for people, uses, and spaces that were tenaciously there long before a disadvantaged place began to improve. It can help to ensure that the *benefits* of development do not accrue primarily to those who had the foresight and fortune to buy up a neighborhood's real estate when prices were depressed. It can help to ensure that the *burdens* of development do not fall disproportionately on individuals who are the least able to bear them. In places where the economic tide has turned, often as a direct or indirect result of the intervention of public funders, private foundations, and nonprofit developers, common ground can bend the arc of prosperity toward justice.

2. Make it Last

"Conditions of surviving and thriving" for persons of limited means are not only lacking in most places of *poverty*, they are also lacking in many places of *prosperity*. The main culprit in the latter is the scarcity of affordable housing. Low-income and moderate-income people may work in affluent neighborhoods, suburbs, and towns. They may shop there. They cannot live there, excluded by rents and prices beyond their reach.[60]

Opening up the privileged enclaves from which low-income families, people of color, and other protected classes are regularly barred has been as much a focus of community land trusts as improving the distressed neighborhoods in which these underprivileged populations are frequently confined. At present, there are more CLTs in the United States that are working in areas where housing prices are robust than in places where housing prices are depressed.[61] As different as the conditions and challenges may be in strong-market versus weak-

60. To focus on the cost of housing, as I am doing here, is not to ignore the presence of other barriers to geographic mobility, past and present, including discriminatory lending and exclusionary zoning.

61. This assessment is based on the experience of Burlington Associates in Community Development LLC, a consulting cooperative co-founded by the author that has directly assisted nearly half of all the CLTs in the United States. It should also be noted that many cities and neighborhoods occupy a wide economic expanse between localities where real estate prices are deeply depressed and those where prices are steeply rising beyond the reach of low-income and moderate-income households. These in-between places may still benefit from remedial treatments like health and safety inspections, vigorous code enforcement, and housing rehabilitation loans, but the more robust investments and interventions of community development are not as prevalent or as necessary here. Community land trusts have found a foothold in such places nonetheless by focusing less on the construction of new housing than on the restoration of existing housing or by doing little housing at all, focusing instead on commercial development or urban agriculture.

market cities, however, there is often a similar lack of attention being paid by policymakers to protecting whatever success they have had in improving conditions for people of limited means. Similar, too, is the preservationist role that CLTs have been asked to play.

Most affordably priced homes produced in affluent areas would simply not exist without the investment of public dollars from a federal, state, or city agency, without the imposition of municipal mandates like inclusionary zoning, or without the beneficence of density bonuses, parking waivers, tax abatements, land donations, infrastructure extensions, or other municipal incentives. Such governmental largess, lavishly bestowed on private developers, landlords, and homeowners alike, is what makes housing "affordable," allowing homes to rent or to sell for below-market prices that are within the financial reach of people on the lower half of the income ladder.

In too many places, however, this heavily subsidized affordability is not designed to last very long. Restrictions imposed on rents and resales, if any, are allowed to lapse after five, fifteen, or thirty years. Prices then rapidly rise to meet the market, public subsidies get stuffed into private pockets and, in some instances, low-income people get displaced.

Despite being spectacularly wasteful, this programmed loss of publicly assisted, privately owned housing has been a standard feature of nearly all housing policy in the United States, at all levels of government, for decades.[62] Pre-planned "expiring use" has been so commonplace, so widely accepted that only a few prescient contrarians were once willing to stand up in the public square and sound the alarm about the attrition of subsidized homes *after* they are built or the risks faced by freshly minted, low-income homeowners *after* they moved in.[63] Their warnings fell mostly on deaf ears.

That began slowly to change under the sequential shocks of the nation's affordability crisis of the 1980s and 1990s and the foreclosure

62. Jake Blumgart, *Have We Been Wasting Affordable Housing Money?*, ROOFLINES (Dec. 3, 2015) http://www.shelterforce.org/article/4322/have_we_been_wasting_affordable_housing_money/ [https://perma.cc/2SQR-QN2X]; *see generally* John Emmeus Davis, *Plugging the Leaky Bucket: It's About Time*, ROOFLINES, (Jan. 27, 2015) http://www.rooflines.org/3995/plugging_the_leaky_bucket_its_about_time/ [https://perma.cc/KDM5-2PNF].

63. Emily Achtenberg, Dean Baker, Rachel Bratt, Cushing Dolbeare, Peter Dreier, Chester Hartman, Peter Marcuse, and Michael Stone were among the first to lament the programmed loss of publicly subsidized housing, criticizing American policy for its shortsightedness. Many of my own writings have mined the same vein, but I came later to the cause, standing on the shoulders of scholar-activists who saw it sooner and said it louder than I.

crisis precipitated by the Great Recession of 2007–2009. These disruptive fluctuations in markets and mortgages caused a grudging shift in the tectonic plates of housing policy. At the municipal level in particular, increased attention began to be paid to preventing the loss of publicly subsidized housing, whether to market pricing, to deferred maintenance, or to foreclosure.[64] That was especially true in stronger markets where public powers were increasingly used rather than public dollars to bring this housing into being, either mandating or incentivizing the production of affordable housing. The disappointing performance of some of the earliest cities that adopted inclusionary housing programs, where thousands of units of affordably priced housing were summarily lost to the market because of short-term affordability controls, provided an object lesson for later adopters.[65] Municipal officials began paying closer attention to preserving the affordability of inclusionary housing for a much longer period of time.[66]

In many cities, this simply meant attaching a covenant to the deeds of residential properties that the municipality's dollars or powers had made affordable, a covenant presumed to be "self-enforcing." City officials blithely assumed that no monitoring or enforcement would be necessary because title companies, mortgage underwriters, or closing attorneys would catch any violations of a covenant's restrictions and block any resales involving an "unaffordable" price or an

64. John Emmeus Davis & Rick Jacobus, *The City-CLT Partnership: Municipal Support for Community Land Trusts*, LINCOLN INST. OF LAND POLICY 10 (2008).

65. Some of the earliest adopters learned their lesson and changed their programs when thousands of inclusionary units were lost to the market. Montgomery County, Maryland, for example, initially imposed only a five-year affordability requirement for homes created under its 1973 Moderately Priced Dwelling Unit Ordinance. This period was increased to ten years in 1981 and increased again in 2005, mandating 30 years for owner-occupied housing and 99 years for rentals. Another example is Irvine, California. Having lost nearly a thousand inclusionary units, the city took the lead in establishing a CLT to protect assisted units in the future. *See* Karen Destorel Brown, *Expanding Affordable Housing through Inclusionary Zoning: Lessons from the Washington Metropolitan Area*, BROOKINGS INSTITUTION, CENTER on Urban and Metropolitan Policy 1, 17 (Oct. 2001) https://www.brookings.edu/~/media/research/files/reports/2001/10/metropolitanpolicy%20brown/inclusionary.pdf. [https://perma.cc/X2E8-6ZAQ]; *see, e.g.*, Rick Jacobus & Michael Brown, *City Hall Steps In*, NAT'L HOUSING INST. 335–341 (2010).

66. Rick Jacobus, *Inclusionary Housing: Creating and Maintaining Equitable Communities*, LINCOLN INST. OF LAND POLICY 1, 35 (2015) ("The overwhelming trend has been for inclusionary housing programs to adopt very long-term affordability periods."); *see also* Robert Hickey, Lisa Sturtevant, & Emily Thaden, *Achieving Lasting Affordability through Inclusionary Housing*, LINCOLN INST. OF LAND POLICY (Lincoln Institute of Land Policy working paper) (on file with Lincoln Institute) (2014) https://www.lincolninst.edu/publications/working-papers/achieving-lasting-affordability-through-inclusionary-housing [https://perma.cc/9PMH-TRWN].

"ineligible" buyer.[67] When this assumption was proven fatally flawed by the steady leakage of affordable units into the market, there was a dawning recognition that somebody had to stay watchfully in the picture if affordability was going to persist. Stewardship rose higher on the public agenda.

That created an opportunity for community land trusts to show that they could do what conventional tenures and programs do not, since stewardship is what CLTs do best. They are willing to stay in the picture long after affordably priced rental housing or homeownership housing has been created, making sure that it lasts. A CLT, in this way, is the ultimate preservationist: acting to ensure the lasting affordability and continuing upkeep of privately owned homes, while helping to ensure the ongoing success of the homeowners or renters who occupy them.[68] As Connie Chavez, former executive director of the Sawmill Community Land Trust in Albuquerque New Mexico was fond of saying, "We are the developer that doesn't go away."

III. Resiliency: The Pursuit of Sustainable Development

Community land trusts are not the only community development organizations that are willing and able to play this stewardship role. Across the country, many other models, mechanisms, and organizations have joined CLTs in being assigned responsibility for the preservation of affordable housing that the largess of local government or a private charity has helped to create.[69] These preservationist tools are often viewed as being equally effective. Equivalency has, in fact, become an article of faith among some housing advocates. From their perspective, it doesn't necessarily matter which model or mechanism is used, as long as subsidies are retained and affordability is sustained.[70]

67. *See generally* John Emmeus Davis, *Design Contractual Controls Over Use and Resale, in* SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING, NATIONAL HOUSING INSTITUTE 1, 54 (2006) http://www.nhi.org/pdf/SharedEquityHome.pdf [https://perma.cc/VX7M-J7A8] (discussing a more detailed discussion of various options for imposing and enforcing affordability controls).

68. John Emmeus Davis, *Homes That Last: The Case for Counter-Cyclical Stewardship*, THE COMMUNITY LAND TRUST READER 562–570 (Lincoln Institute of Land Policy 2010) (explaining that these duties are sometimes called the three faces of stewardship).

69. Overviews of these models and mechanisms can be found in Davis (2006), *supra* note 67, at 13; and JEFF LUBELL, *Filling the Void between Homeownership and Rental Housing: A Case for Expanding the Use of Shared Equity Homeownership, in* HOMEOWNERSHIP BUILT TO LAST 203–227 (Eric S. Belsky, et al. eds., 2014).

70. *See* Emily Thaden, *Mission Above Method*, ROOFLINES, NATIONAL HOUSING INSTITUTE (March 6, 2014) http://www.shelterforce.org/article/3627/Mission_Above_Method/?utm

That may actually be true when times are normal and nothing goes wrong. Other tools may be just as effective as community land trusts in ensuring that equitable gains are made to last, at least when it comes to preserving the affordability of subsidized housing. But the fortunes of low-income people, low-income communities, and the nonprofit organizations that serve them are constantly in flux and unavoidably precarious. Stability amidst a fluctuating economy and shifting politics can be hard to come by. Something inevitably goes wrong. Among the developers of subsidized housing, there may be shenanigans in trying to bypass affordability and eligibility restrictions that encumber their properties. Among the owners of resale-restricted homes, there may be delays in doing repairs or delinquencies in paying mortgages. Among the organizations charged with stewardship, there may be lapses in intervening when housing is at risk, and on occasion, flaws in the organizations themselves may lead to a failure to thrive.

If affordable housing is to be preserved, therefore, regardless of whether the local real estate market is hot or cold, the contractual and organizational system put in place to make it last must be able to withstand a changing environment and the changing circumstances of the people served. It must be able to cope with occasions when people do not behave as they should. It must not only plan for success, but also plan for failure and endure nonetheless. In a word, that system must be *resilient*.

Just as equitable development revolves around the question of "who benefits," with redistribution being the aspirational goal, sustainable development hinges on the question of "how long," with *forever* being the gold standard to which practitioners aspire and *resiliency* being the means for getting there. These are overlapping concerns. When it comes to place-based development, making it fair and making it last are two sides of the same coin. Development can be considered equitable only if it can be sustained, and it is *worth* sustaining only if it is equitable.

Sustainability in the context of common ground has a narrower meaning than is typical in most discussions of sustainable development.[71] For CLT practitioners, sustainability tends to be couched less

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71. *See, e.g.*, MARK ROSALIND, TOWARD SUSTAINABLE COMMUNITIES: SOLUTIONS FOR CITIZENS AND THEIR GOVERNMENTS 21 (New Society Publishers, 4th ed. 2012) (Roseland does something unusual in this admirable book. While embracing the broadest possible concep-

in terms of minimizing pollution or reducing the consumption of natural resources on a limited planet than in terms of preserving affordable housing and other place-based facilities, spaces, and activities that have been created for people of limited means. The more common meaning of sustainability is not overlooked. It might be argued, in fact, that the longer time horizon of community land trusts and other nonprofit community development organizations that "don't go away" will necessarily make them more receptive to environmental concerns than developers that build and bolt. When a nonprofit owns the underlying land and has an abiding interest in what happens to buildings, occupants, and enterprises that are sited on its land, there is reason to believe that the nonprofit landowner/developer may be more appreciative of the need to construct greener buildings that are more durable and use energy more efficiently, while respecting the carrying capacity of land, water, and air.[72]

For purposes of the present discussion of common ground, however, sustainability will be considered mostly in terms of the longevity of the development that has been done on a CLT's land and the deal that has been struck with the low-income and moderate-income people who inhabit a particular place. Our focus will be affordably priced housing in particular, and resale-restricted homeownership at that. The latter can be seen as a test case for exactly how sustainable this model of long-term ground leasing might be. If owner-occupied homes are more likely to be kept affordable, and if stewardship is more likely to be effective when homes are sited on community-owned land, then other types of development and other uses of land stewarded by a CLT should prove to be more sustainable as well.

Longevity is a function of resiliency, perpetuating what has been developed or achieved in the face of adversity. On this count, common ground is not merely the equal of other models and mechanisms. It is better, legally, operationally, and organizationally. The restraints on what a building's owner may do with his/her property, including the price for which it may be resold, are more likely to be enforceable over a longer period of time. Intervention by the organization overseeing these restraints is more likely to happen, forcing

tion of "sustainability," he applies it narrowly to the neighborhoods and towns where people live. As he puts it: "To make sense of the sustainability imperative at the community level, we need a new focus on place." *Id.*).

72. While it is reasonable to believe that the longer time horizon of a "developer that doesn't go away" will result in a heightened sensitivity to environmental concerns and a different set of cost-benefit calculations when planning a project and using land, this hypothesized effect of common ground has never been studied.

compliance and protecting the affordably priced housing that everyone has worked so hard to create. Failure, should it occur, is more likely to be graceful, rather than catastrophic. These are advantages inherent in the long-term leasing of community-owned land that allow a CLT to continue doing good even when things go bad.

A. Enforceable Restraints: The Legal Case for Common Ground

Covenants have been used far more frequently than ground leases to preserve the affordability of publicly assisted, privately owned housing. The former mechanism has been a particular favorite of various state and municipal agencies that either indirectly produce affordable housing through inclusionary mandates or regulatory incentives, or directly subsidize affordable housing through the investment of public funds.

Covenants have been preferred in part because they have been assumed to be simpler and easier than ground leases. Both assumptions were actually true, as far as they went. The affordability covenants used in the past *were* simple: a one-page or two-page addendum attached to the deed for a house or condominium. These older covenants had only two purposes: restricting the price for which homes could resell and limiting the pool of income-eligible households who could buy or rent these homes.

By comparison, most ground leases, especially those used by community land trusts, were lengthy and complex, containing myriad restrictions beyond the future determination of resale prices and income limits. The model ground lease used by most CLTs gave a nonprofit lessor the legal ability to regulate occupancy and subletting in the lessee's buildings; to review and approve the building's financing and re-financing; to require regular maintenance; to approve post-purchase capital improvements; to collect fees for the use of the lessor's land; and to undertake other activities designed to protect the subsidies invested, the structures purchased, and the low-income families who occupied these homes.[73]

Older deed covenants were also easier to administer, since the nonprofit and governmental entities that used this mechanism considered them to be "self-enforcing." Public officials believed no extra work would be needed on their part to ensure compliance with a covenant's requirements. They assumed that title companies, mortgage underwriters, or closing attorneys would catch violations of a cove-

73. White, *supra* note 27, at 65.

nant's restrictions and block any resale involving an "unaffordable" price or an "ineligible" buyer. Furthermore, the term of most covenants was relatively short. Affordability covenants that lasted no longer than five to fifteen years were the norm. All restrictions then disappeared, allowing property owners to resell to anyone they wanted for any price they could get.[74]

By contrast, most ground leases lasted a very long time and presumed the ongoing involvement of the landowner in approving any changes in use or any plan by a lessee to sublet, improve, refinance, or resell his/her building. It was not a third-party title company, underwriter, or attorney who was responsible for monitoring and enforcing a leaseholder's compliance. It was the owner of the land on which a leaseholder's building was located. Stewardship was part of the deal, a nonprofit landowner's long-term responsibility.

When deed covenants were said in the past to be "easier," therefore, or when the same is said in the present, that claim is often true—up to a point. Covenants that impose fewer restrictions, covenants that presume no oversight, and covenants that disappear after a short period of time are clearly *not* as cumbersome or burdensome as ground leases that are longer-lived, more closely monitored, and more detailed and multifaceted in the activities they regulate.

Covenants have been steadily catching up, however, becoming more persnickety, comprehensive, and complex. No longer can comparisons between deed covenants and ground leases be based primarily on either the content of the contracts or the commitment to stewardship by the entity that developed or funded the housing. Increasingly, deed covenants are being crafted to contain many of the *same* terms and conditions as ground leases and, here and there, the *same* kind of stewardship regime is being instituted for covenants as was once the exclusive purview of community land trusts and limited equity cooperatives.[75]

Equivalency in the *content* of covenants and leases does not make them equivalent when it comes to their *enforceability*, however. Indeed, one of the strongest arguments for the superiority of residential ground leasing has always been that it is better able to withstand legal

74. The affordability period for mortgage liens, when used as the mechanism of choice, would last only as long as the mortgage, typically 15-30 years. THE NEST, *The Typical Mortgage Term*, http://budgeting.thenest.com/typical-mortgage-term-3487.html (last visited Oct. 22, 2016) [https://perma.cc/MMB3-R86D].

75. This has been somewhat true for mortgage liens as well, when used to preserve the affordability of publicly assisted privately owned housing. Many conditions on the use and improvement of subsidized homes are being inserted into these liens.

challenge—over a longer period of time. Without delving too deeply into arcane legal doctrines like the rule against perpetuity, the rule against unreasonable restraint on alienation, touch and concern, and privity, suffice it to say that long-lasting restrictions on the use and resale of privately owned real estate are generally considered to be more legally defensible when the party imposing those restrictions has a proximate interest in the restricted property and when the restrictions themselves have an end date—even if the restrictions last for many years. Ground leasing receives a passing grade on these legal tests, while perpetual covenants that "run with the land" frequently do not.[76]

Recognizing the vulnerability of deed covenants in this regard, several states have enacted statutes that give specific sanction to long-lasting affordability covenants when they are used to preserve the public's investment in housing. In Maine, Massachusetts, Oregon, and Vermont, for example, legislative action has put the enforceability of deed covenants on a strong footing.[77] It is arguable that in these states, but in these states alone, deed covenants may now be just as enforceable as ground leases, assuming there is someone standing reliably and vigilantly in the wings to do the enforcing.[78]

How they are to be enforced is an open question, however. The party that imposed a covenant's restrictions on occupancy and use may conceivably pursue court action to compel compliance when there is a violation, but the judicial path to the enforcement of deed covenants is neither well-traveled nor clearly marked. By contrast, the means for enforcing the terms of a ground lease is, as David Abromowitz has pointed out, "[t]he relatively familiar process of declaring a default under the ground lease and, if the default remains

76. *See generally* David Abromowitz, *An Essay on Community Land Trusts: Towards Permanently Affordable Housing*, 61 Miss L.J. 663 (1991); David Abromowitz & Kirby White, *Deed Restrictions and Community Land Trust Ground Leases: Two Methods of Establishing Affordable Homeownership Restrictions*, The Community Land Trust Reader 327–334 (2010); John Emmeus Davis, *Durable Affordability*, *in* Shared Equity Homeownership: The Changing Landscape of Resale-Restricted, Owner-Occupied Housing, 76–80 (National Housing Institute, 2006); James J. Kelly *Homes Affordable for Good: Covenants and Ground Leases as Long-term Resale-restriction Devices*, 29 St. Louis U. Pub. L. Rev. 9, 38 (2010).

77. Ryan Sherriff, *Shared Equity Homeownership State Policy Review*, 19 J. Of Affordable Hous. & Cmty. Dev. L. 279, 283 (2010).

78. In North Carolina and Ohio, state law and court precedents have caused some lawyers to question the legality of separating the ownership of land and residential buildings, even though shopping centers, office buildings, and other commercial structures are regularly developed on leased land in both states.

uncured, obtaining judicial relief through the typical landlord-tenant summary process."[79]

In sum, except for states where there is explicit legislative sanction for affordability covenants, the enforceability of ground leases is likely to be more durable and sure. Furthermore, the precedents and procedures for enforcing ground leases, as Abromowitz has noted, are better established than for covenants, especially when it comes to remedying violations by homeowners who are still occupying the property with no immediate plan to resell.

B. Dependable Intervention: The Operational Case for Common Ground

A stewardship regime can be put in place that looks virtually the same for deed covenants and ground leases, regulating property to the same degree and assigning the same duties to some designated steward. That can be true for mortgage liens as well. That does not mean these contractual mechanisms will *perform* the same, however. Organizations that own the land beneath resale-restricted housing are more likely to know when their homes and homeowners are having problems. They are more likely to prevail in negotiations with private lenders to prevent these problems from leading to the loss of lands and buildings from the organization's portfolio. They are more likely to intervene when problems arise. These advantages give community land trusts and other nonprofit organizations using ground leases an operational edge over programs that use covenants or liens instead.

1. Intelligence

One of the keys to effective stewardship is learning about problems long before they become serious and too costly to fix. Every effective stewardship regime will adopt procedures for monitoring compliance and correcting violations, but ground leasing contains a formal and informal "early warning system" less frequently found in programs using deed covenants.

The *formal* components of this system are (1) the collection of ground lease fees from homeowners (and from the owners of other types of buildings on a lessor's lands) and (2) notification from lenders of any mortgage delinquencies.[80] The revenues raised from lease

79. Abromowitz (*An Essay*), *supra* note 76, at 667.

80. White, *supra* note 27 at 67–68 (The collection of lease fees is covered in Article 5 of the Model CLT Ground Lease. Notification of the lessor of a mortgage default by the lessee is covered in Article 8.4 and Exhibit: Permitted Mortgages).

fees are useful in covering a portion of the steward's operating costs, but they serve another function as well. They give the steward's staff a regular glimpse into how the organization's leaseholders are faring. The first thing the owners of buildings on leased land tend to stop paying, when experiencing financial distress, are the lease fees owed to their benevolent landlord. A pattern of late fee payments or an accumulating arrearage is usually an indication of more serious problems, alerting the steward of the need to intervene.

Most organizations selling homes on leased land have a second tripwire built into their system. They become a party to the mortgage. The mortgage lender agrees to notify the landowner if any homeowners become seriously delinquent in their monthly mortgage payments.[81] A lender may do the same when receiving an application to refinance a home on leased land. As in the case of the late payment of lease fees, such notifications alert the steward to changes in the leaseholder's financial circumstances that may jeopardize the homeowner's ability to care for the home or to hang onto it.

The *informal* components of a lessor's early warning system are (1) the continuing relationship between lessor and lessee after a home is sold and (2) the continuing visibility of the landowner in the eyes of close neighbors and city officials. The very structure of ground leasing requires the landowner and homeowner to stay in touch and, to some degree, to get along. If this relationship is a good one, the homeowner is more likely to volunteer information about distress, giving the steward an opportunity to lend a hand. This marriage of convenience is forged early in the process of preparing a prospective homebuyer for a leaseholder's life on the steward's land. As described by Devika Goetschius, director of the Housing Land Trust of Sonoma County in Petaluma, California:

> During every community land trust homebuyer education class, I've looked each person in the eye and told them, "When your financial circumstances change – good or bad – you call me."[82]

With admirable regularity, they do.

Any organization that serves as the long-term steward for a portfolio of resale-restricted, owner-occupied housing can establish a trust-

81. *Id.* Banking law and privacy concerns have led CLTs in some states to execute a three-party agreement among the homeowner, the lender, and the steward, allowing the lender to share such information with the steward.

82. Emily Thaden & John Emmeus Davis, *Stewardship Works*, SHELTERFORCE (Dec. 24, 2010) http://www.shelterforce.org/article/2080/stewardship_works/ [https://perma.cc/5CXM-XEXJ] (quoting Devika Goetschius, Executive Director of the Housing Land Trust of Sonoma County).

ing and continuing relationship with the people who are buying their homes, regardless of the mechanism used to impose that restriction. My argument is not that such a bond is necessarily absent from programs that rely on covenants or liens, but that it is more essential and, therefore, more likely in programs where the steward actually owns the land under a homeowner's feet. That is partly the result of the landowner and homeowner being materially and psychologically tied together and partly a function of the landowner being constantly reminded of this relationship by parties looking on from the outside. The landowner can never be entirely invisible or forgotten, no matter how low a profile it may want to maintain. Local neighbors are likely to complain to the landowner when homes are not kept in good repair or when the grounds around them become cluttered with junk cars. City officials are likely to notify the landowner when there are violations of building or zoning codes, or when homeowners have failed to pay special assessments or property taxes. A steward using deed covenants will be pestered by fewer of these busy-body calls—for which an overworked, under-staffed steward may be thankful. But that also means that the steward's staff will be deprived of valuable on-the-ground intelligence of pending problems in the organization's portfolio of resale-restricted housing.

2. Leverage

A ground lease gives a nonprofit steward a wider range of options in dealing with a homeowner who is not occupying the home as her primary residence, not maintaining adequate insurance, not keeping the home in good repair, or not fulfilling any number of other responsibilities to which she agreed when purchasing the home. The landowner's ultimate leverage in compelling compliance is the threat of eviction from the leasehold, but ground leases also contain a graduated series of less-drastic warnings, penalties, arbitration, and opportunities for injunctive relief.[83] Nearly all violations are corrected long before reaching the dire straits of a CLT acting to remove a homeowner from its land.[84]

83. White, *supra* note 27, at 76–77 (Article 12 (Default) and Article 13 (Arbitration)).

84. In serious situations, where leaseholders are clearly unable or unwilling to correct violations in the terms and conditions of the ground lease, most CLTs are more likely to repurchase the home, buying out the homeowner and enabling her to move elsewhere, instead of forcibly evicting her from the leasehold. Indeed, I know of no CLT to date that has actually evicted a homeowner/leaseholder, although the threat to do so has sometimes been used as leverage to persuade a homeowner who is not complying with the terms of her ground lease to move.

Equally important, by owning the land a community land trust (or other nonprofit lessor) has greater leverage in negotiating with private lenders or public funders who hold a mortgage on a troubled home or, for that matter, on any other building on its land. What is mortgaged in most ground leasing programs—and what a lender is allowed to seize if a loan goes bad—is the house and other structural improvements, *not* the underlying land.[85] This strengthens the steward's hand, while multiplying the possibilities for dealing with mortgage defaults and foreclosures. The lender may enlist the nonprofit landowner's cooperation in negotiating a workout with the homeowner, keeping the mortgage in place while putting the homeowner on a schedule to resolve the delinquency. The nonprofit may accept a deed in lieu of foreclosure from the homeowner. The nonprofit may decide to buy the house from the lender following foreclosure.[86] Alternatively, the nonprofit may decide to let the lender sell the foreclosed home for whatever price the lender can get from any buyer the lender can find. Whoever buys the building must then deal with the nonprofit owner of the underlying land.[87]

In short, even when a home (or other building) slides toward foreclosure, and even should a foreclosure actually occur, the nonprofit steward stays stubbornly in the picture. No matter how distant or distracted the lender, the presence and interests of the landowner cannot be entirely ignored.

3. Intervention

Any steward worth its salt will have reserved the right to intervene to preserve the homeownership opportunities it has worked so hard to create. Regardless of whether this authority is granted through a deed covenant or ground lease, therefore, every steward should be able to block resales in violation of affordability controls, to correct deferred maintenance, and to arrest the slide toward foreclosure. But having

85. Technically, what is mortgaged is the home and the "leasehold estate." Some ground leasing programs have been forced to subordinate the steward's interest in the land, however. In these less-than-desirable arrangements, the lender is allowed to seize both the house and the land in foreclosure.

86. Under many financing arrangements for mortgaging homes on leased land, the landowner is given the first right to buy the house out of foreclosure. There is no reason, however, why the same right could not also be granted to a steward using deed covenants.

87. The landowner has leverage, too, in dealing with the building's new owner. The nonprofit will usually have the option of charging a market-rate ground rent in any situation where restrictions on the home's resale, occupancy, or subletting are suspended or invalidated. Charging a "fair market rental value" in these circumstances is the landowner's right under Section 5.6 of the Model CLT Ground Lease. *See* White, *supra* note 27.

the *right* to intervene is not the same as having the *will* to do so. In this regard, ground leasing comes out ahead.

It is not that the people who run programs using ground leases are more virtuous or energetic than those who run programs using deed covenants; rather, their incentive to intervene is greater should problems arise. When the homes for which a steward is responsible are located on land that the steward owns, it is much harder for the organization to ignore its stewardship responsibilities or to walk away from the deal. To put it bluntly, the steward is "stuck." Those buildings that are not being maintained? They are on the steward's land. Those homes with taxes or mortgages in arrears? They are on the steward's land. And everybody knows it, especially those government agencies that have granted or loaned money to the landowner on the condition that homes will remain affordable forever.

Moreover, if a public funder has been smart in investing its homeownership subsidies, that investment will have been granted or loaned to the owner of the land, not to the owner of a resale-restricted home. The public agency will then have the ability to go after the nonprofit steward if affordability is compromised or if maintenance is deferred.[88] That gives the land a stickiness all its own, for there is no place for the nonprofit steward to hide and no easy way for the organization to divest itself of assets that public dollars have helped it to acquire.

In the face of the many *dis*incentives to intervention, including the time required, the money involved, and the risk of antagonizing homeowners who would rather be left alone, stewards using mechanisms other than a ground lease are more likely to decide that the cost is simply too high (and, perhaps as suggested earlier, the judicial path to a corrective remedy too uncertain) to go to the extra trouble of rescuing a distressed property. Owning the land tends to nudge this calculation in the opposite direction, creating an incentive to act that outweighs the inclination to do nothing. Ground leasing, in this regard, is what behavioral economists would call a *commitment device*.[89] It locks the steward into living up to its own promises, raising the reputational cost of not intervening to protect the buildings upon its land.

88. In some cases, municipalities have insisted that, as a condition of conveying their funds to the landowner/steward, the municipality itself will be able to take over the lessor's stewardship responsibilities if the lessor is unable or unwilling to do so.

89. *See, e.g.,* Gharad Bryan, Dean Karlan, & Scott Nelson, *Commitment Devices*, 2 ANNU. REV. OF ECON. 671, 673 (2010); *see also* Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O'Donoghue, & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1217 (2003).

Stewardship is more certain when the organization assigned responsibility for stewardship is not only vigilant but vested, ensnarled in a web of its own making, compelled to do the right thing even when tempted to look the other way.[90]

C. Graceful Failure: The Organizational Case for Common Ground

It might seem self-defeating to mention "failure" while extolling the virtues of community-owned land and long-term ground leasing. But the emphasis here is on GRACEFUL failure. This is a fault-tolerant principle lifted from the world of engineering and computer programming, where complex systems are intentionally designed to continue operating properly even when there is a flaw or failure in one of their components.[91] Engineers do not set themselves the impossible goal of building a transportation network, an electrical grid, or a computer program that will never fail. They strive, instead, to create systems that are robust and resilient. Such a system when subjected to extreme conditions may bend, but it does not break. It may flicker, but it does not crash. It may eventually collapse, but with enough warning and backup so as to protect its most valuable components.

Graceful failure is designed into a housing delivery system whenever stewardship is added as a backup for low-cost homes and low-income households that have been assisted with public or private dollars.[92] A stewardship regime makes failure less likely. It also helps to ensure that when failures do occur, which cannot be entirely avoided

90. *See* Thaden, *supra* note 32 (A number of studies have documented the lower loss to foreclosure of resale-restricted homes versus market-rate homes during the Great Recession, but almost no research has been done comparing the performance of one model of resale-restricted housing to another.). *See also* THE DENVER OFFICE OF ECONOMIC DEVELOPMENT, INCLUSIONARY HOUSING ORDINANCE (2011) (The exception is a comparison that was published by the City of Denver's Office of Economic Development (OED) in 2011. The OED examined 1056 resale-restricted, owner-occupied houses and condominiums created in large-scale projects by private developers, 2002 to 2010. The projects are in three different neighborhoods, located less than three miles apart. Affordability covenants were used in Stapletown/Forest City (222 units) and at Green Valley Ranch (648 units). These neighborhoods had a foreclosure rate of 6.31% and 24.54% respectively. In the Lowry neighborhood (186 units), however, where ground leases were used by the Colorado Community Land Trust to preserve the homes' affordability, the foreclosure rate was 0%).

91. This principle has also been called "graceful degradation" or "graceful exit." *See* John Emmeus Davis, *Shared Equity Homeownership: Designed to Last*, 20 COMMUNITIES & BANKING 29, (2009).

92. *See, e.g.,* John Emmeus Davis, *Shared Equity Homeownership: Designed to Last*, 20 COMMUNITIES & BANKING 29, (2009). Mr. Rosenberg has argued that graceful failure is a virtue of deed covenants, not of ground leases, since covenants are easier to "unwind" if a nonprofit houser no longer has the capacity or the will to perform its stewardship role. I am

when dealing with economically vulnerable people, structurally vulnerable assets, and a hopelessly convoluted system for regulating, financing, and subsidizing affordable housing, these failures will not be catastrophic. When stewardship accompanies the deal, homes are more likely to last.

I have argued already that the *operational* effectiveness of a stewardship regime is enhanced by a steward's ownership of the land underlying any residential buildings for which it has been assigned responsibility. But what of the *organizational* effectiveness of the steward itself? If it is true, as history has amply demonstrated, that there is no such thing as a "self-enforcing" covenant, lien, or lease and that some organization must stay watchfully in the picture for many years, stewardship must necessarily depend on the ongoing viability of that organization. It must have the capacity to do the job and the ability to survive. The steward, too, must be designed to last.

An under-appreciated function of common ground is that it tends to make organizational failure less likely and, should the organization begin to founder, to render its distress or demise less catastrophic. It builds greater resiliency into a stewardship regime.

One of the best ways to ensure that a CLT or any other nonprofit steward will be around for the long haul is to build a diverse portfolio of revenue-generating assets, reducing the organization's dependency on outside funders. Ground leasing, in this regard, can contribute significantly to a steward's bottom line, depending on the magnitude of the organization's holdings. Most or all of the ground lease fees collected from the owners of buildings on the steward's land can be used to cover the landowner's operating costs, especially those incurred in meeting its stewardship responsibilities. Furthermore, when that portfolio includes multi-unit rental housing on leased land, and perhaps commercial buildings as well, the operational revenue from lease fees can be quite substantial.[93]

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arguing the reverse, of course, that the virtue of ground leases is that they *are* harder to "unwind," discouraging a lessor from walking away when things get difficult.

93. These revenues will be meager when an organization's portfolio is small. It is only after a CLT (or other nonprofit landowner) is able to build a large and diverse portfolio that it will begin to generate a significant stream of revenue for its own operations. Even then, however, a CLT that is engaged in many different activities will never be able to cover *all* of its operating costs through lease fees, only those directly related to stewardship. The goal of organizational self-sufficiency, when it comes to the stewardship of affordable housing, must be minimalist: an organization should strive to generate enough revenues from its own portfolio to cover the cost of watching over that portfolio, even if the organization were to cease all other activities. I designed and taught the first stewardship courses offered by the National CLT Network. This "minimalist" goal was part of this course.

Ground leasing has a favorable effect not only on a nonprofit landowner's cash flow, but on its balance sheet as well. When public subsidies or private donations for affordable housing or for other community development projects are put into the underlying land, with the nonprofit serving as the long-term steward for the land and the buildings, the nonprofit gets to book the unencumbered value of that land as an asset. The same is not true, incidentally, when a steward merely holds the right to enforce the affordability provisions in a covenant or lien.

Should this landed asset appreciate in value, appreciation to which the organization's own neighborhood improvement efforts may have contributed, the original entry on its balance sheet does not increase; but the added value may be available for taking and using by the organization if needed down the road. The length of the typical CLT ground lease and the charitable mission of most nonprofit organizations that are doing ground leasing will necessarily and properly impede short-term profit taking on land gains, but there may be occasions when this appreciating asset can be legitimately accessed and used to support the organization and its mission. The nonprofit landowner may sometimes choose to convert some of its land to a "higher" use than affordable housing, for example, if conditions in the neighborhood have changed to the point where a different use of that land is warranted.[94]

There may also be times (rare so far) when a CLT homeowner defaults on a mortgage and intervention fails. The CLT could then find itself holding the land under a house a bank has seized through foreclosure and resold to a higher-income buyer. The CLT, as landowner and lessor, would have the ability under the terms of the ground lease to charge a higher lease fee to the new owner, if the house is no longer owned or occupied by a low-income household. In this situation, there would be an opportunity for the CLT to lease out a parcel of land at a monthly rate much higher than the heavily subsidized lease fee that is typically charged to a low-income homeowner, generating added revenue for the organization.

Under direr circumstances, owning land may allow a wobbly organization to right the boat and to return to being an effective steward. Alternatively, owning land may entice another nonprofit into

94. It should be noted that such a change in use could occur only at the *endpoint* in a ground lease or when lessees decide to resell their buildings to the landowner. The Model CLT Ground Lease used by CLTs and by a number of other community organizations do not allow the lessor to decide unilaterally to terminate the lease. *See* White, *supra* note 27.

taking over the steward's assets and responsibilities. "Where there is land, there is hope," says Brenda Torpy, executive director of the Champlain Housing Trust (CHT), a community land trust in Burlington, Vermont. It is an adage heard in the hallways of CHT whenever it looks like there is likely to be a distressed building on CHT's land, especially a house that is owner-occupied. Landownership gives the steward more options in solving the problems of a failing homeowner, a failing building, or a failing mortgage. The same may be said of a distressed organization. Landownership gives the board of a failing steward more options in trying to save what is most important—and a greater incentive to do so.

What matters most in these situations is saving the affordable housing into which a public agency or private foundation has invested its money and into which low-income people have poured their savings and dreams. In a time of crisis, a nonprofit landowner with a charitable mission must think first of the wellbeing of the homeowners and renters who live on its land. Its primary obligation is to them. The governing board of a shaky steward must do whatever is necessary to protect its leaseholders, including perhaps the prudent decision to lease out some of its land for a "higher" use than housing or the painful decision to sell off some of its land.[95]

The board may be led in more extreme cases of organizational distress to look for a suitor: another nonprofit that is willing to absorb the CLT through a corporate merger or that is willing to accept the CLT's assets upon the latter's dissolution. A steward with land on its books, along with a guaranteed stream of revenue from future lease fees, brings a lucrative dowry to the search for a partner or successor. This can increase the odds of attracting and negotiating an attractive organizational match that will protect the homes on the steward's land and perpetuate the stewardship regime surrounding them.

The key here is not only that ground leasing gives the board of a faltering organization more options, but also more motivation to pursue them. Similar to a CLT's commitment to oversight and intervention, a lessor and its lessees are married to one another in a mixed-ownership arrangement that is not easy to unwind. The difficulty of doing so can be a good thing in a time of crisis, forcing everyone to

95. Even CLTs that are philosophically committed to *never* returning land to the speculative market have sometimes been forced to do so in service to mission and their own survival. The model bylaws adopted by most CLTs make land sales very difficult, requiring approval by both the board and the membership, but it can be done. *See* White, *supra* note 27 (*Model Classic CLT Bylaws*).

slow down, dig in, and work harder to solve the organization's problems.[96] When there is more at stake, as there is when low-income households live on the land that an organization owns, the governing board will do almost anything to make things right, even to the point of sacrificing the organization itself through merger or dissolution if that means saving its leaseholders' homes.[97]

IV. Just Places: The Transformative Potential of Common Ground

Fifty years ago Andre Gorz, a social philosopher living in France, drew a distinction between ameliorative measures that buttress existing relations of property and power versus those that open tiny cracks in the structure of inequality, slowly accumulating over time to offer an ideological and political challenge to the status quo. He called the first "reformist reform" and the second "non-reformist reform."[98]

Gorz's categories were recently revived and provocatively applied by James Meehan in his examination of community land trusts in the United States, using the Dudley Street Neighborhood Initiative in Boston as his principal case. He concluded:

> It is clear that CLTs, in their diverse character and situations, walk the fine dividing line between the two tendencies of reformist and non-reformist. In many cases, the CLT legal model has been used as a gimmick to keep low-income housing costs low (thus taking pressure off the state and the private sector). In others, they play a role in raising consciousness to the realities of power in regard to land, questioning speculative ownership of land, and enabling some degree of community control over the local land base.[99]

Meehan captures well the tension between the pedestrian, day-to-day practice of CLTs and the loftier, transformative possibilities that

96. At the same time, the difficulty of unwinding this deal should give pause to any nonprofit that is contemplating ground leasing for the very first time. A smaller nonprofit or a start-up nonprofit may not be ready for the added responsibilities and challenges that come with ground leasing. Such an organization may be better advised to use deed covenants instead, perhaps as an interim step, transitioning to ground leases when it has more administrative capacity and a broader political base to do ground leasing well.

97. There have, in fact, been several instances where a CLT board has deliberately and successfully sought out another nonprofit to take over its lands, leaseholds, and stewardship responsibilities. In those cases, the lessor-lessee arrangement has remained intact, even when the corporate identity of the lessor has changed and the CLT has been absorbed into another nonprofit organization.

98. André Gorz, Strategy for Labor: A Radical Proposal 7 (Beacon Press, 1964).

99. James Meehan, *Reinventing Real Estate: The Community Land Trust as a Social Invention in Affordable Housing*, 20 Journal of Applied Soc. Sci., 113, 131 (2013).

may result from their work. CLTs are, in fact, an effective scheme for lowering housing costs, preserving affordability, promoting upkeep, and preventing foreclosures. Indeed, a CLT's full-cycle commitment to cost reduction at the front end and dependable stewardship at the back end is a marked improvement over the build-and-bolt mentality that characterizes most other programs for producing affordable housing or for boosting low-income people into homeownership.

At the same time, community land trusts, like every other nonprofit organization working to improve conditions and to expand opportunities for disadvantaged people, do reinforce the hold of dominant institutions. When they expand access to mortgage capital for populations and places that have experienced redlining in the past, CLTs inadvertently contribute to the legitimization of a system of private finance that has been a source of woe for many low-income communities. When they expand access to homeownership for people who have been excluded from the private market, CLTs affirm and fuel the individualization of property that has been a flashpoint in the politics of place, where interests of property drive a frequently contentious wedge between owners and renters, haves and have-nots. Community land trusts, from this perspective, can be seen as a reformist tool for propping up the status quo, softening the edges of a harmful system that is left unchallenged and unchanged.

There is another way of looking at it, however, for the cumulative effect of community-led development on community-owned land may be to transform that system into something else. In the words of Peter Marcuse:

> Community land trusts challenge the arrangements of a housing market used to the pleasures and pains of speculating on housing value . . . . They can move from seeing housing as a commodity, valued for its exchange value, the profit it can produce, and see it rather as a necessity of life, even perhaps up to a certain configuration as a public good.[100]

The arrangement under which land and housing are managed by a CLT holds the potential for fundamentally changing ideas, institutions, and relationships that have long governed the allocation of property and power in the place of residence. An ideology of possessive individualism, used by landlords and homeowners alike to justify their capture of all gains in value accruing to real property, is chal-

100. Peter Marcuse, *Community Land Trusts as Transformative Housing Reforms*, PETER MARCUSE'S BLOG (July 23, 2014) https://pmarcuse.wordpress.com/2014/07/23/blog-54-community-land-trusts-as-transformative-housing-reforms/ [https://perma.cc/9847-AH8V].

lenged by a CLT's dogged pursuit of a more equitable balance between the "legitimate" interests of individual residents and the community around them, secured though the collective ownership of land and the contractual imposition of durable controls over the uses and prices of housing.[101] The power of private lenders is moderated by the CLT's front-end right to approve any mortgages proposed for buildings sited on its land, screening against predatory lending, combined with the CLT's back-end right to intervene in cases of mortgage default, preventing most foreclosures. The politics of place are modified by a nonprofit landowner that is drawn into sharing and wielding power on behalf of residents living on and around its land.

Admittedly this happens within the geographic confines of a rather limited territory, encompassing a service area as small as a single neighborhood for some CLTs. It happens within the functional confines of a limited circle of institutions that determine how land-based wealth is distributed and how real estate is owned, regulated, and financed. Community-owned land may truly be a creative vehicle for non-reformist reform, but its territorial and institutional reach would not seem to extend very far.

It may be argued, on the other hand, that any institution that offers a counter-narrative to practices and meanings that buttress inequality carries a seed of possibility for influencing places and institutions that surround it. When one community prudently plans for success by improving conditions in a particular place without displacing its most vulnerable residents, it raises the question of why *equitable* development doesn't happen more widely. When community-led development on community-owned land creates a stock of housing that is permanently affordable in the face of market forces that pose a credible threat to all affordably priced housing, most of which would not exist without governmental funds or inclusionary mandates, it raises the question of why *sustainable* development is not a requisite of all housing policy.

101. From the earliest days of the CLT, advocates for the model have wrestled with the philosophical question of exactly what these "legitimate" interests might be, accompanied by the practical problem of how to achieve an equitable balance between individuals and communities when allocating the benefits of real property. A seminal discussion of this issue can be found in the opening chapters of: MARIE CARILLO ET AL., THE COMMUNITY LAND TRUST HANDBOOK 5 (Rodale Press, 1982). Many earlier theorists wrestled with the same issue. *See, e.g.,* R.H. TAWNEY, THE ACQUISITIVE SOCIETY (Harcourt, Brace and Howe, Inc., 1920); *see also* REINHOLD NIEBUHR THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS (Charles Scribner and Sons, 1944).

A community land trust, from this perspective, represents what Ulrich Beck has called a "creative construction," a social innovation that not only transforms relations within its particular sphere of influence but brings pressure to bear on the intellectual and political systems that surround it, "besieging what exists with a provocative alternative."[102] In a similar vein, Eric Olin Wright has pointed to "community-controlled land trusts" as one of several strategies for achieving what he calls "interstitial transformations." These are alternative institutions that "seek to build new forms of social empowerment in the niches and margins of capitalist society, often where they do not seem to pose any immediate threat to dominant classes and elites."[103]

It cannot be said that most people drawn to a CLT, whether as practitioners or beneficiaries, are motivated by the prospect of mounting some sort of ideological, institutional, or political challenge to the status quo. Most have little interest in "besieging" anything. Many are blissfully unaware of the transformative potential of community-owned land beyond its immediate utility in helping low-income people to obtain and retain a home.[104] Even those who passionately embrace the CLT as a vehicle for moving toward a more just society may speak only in whispers about the radical proposition at the heart of the model they employ. As the sweet old lady confided to a colleague of mine several years ago, while talking proudly about the success of

102. Ulrich Beck, Individualization: Institutionalized Individualism and Its Social and Political Consequences 190–91 (Mike Featherstone ed., 2005).

103. Eric Olin Wright, Envisioning Real Utopias (Verso, 2010). Peter Maurin, who had inspired Dorothy Day to create the Catholic Worker, would have described this less grandly as creating a "society in which it is easier for people to be good," invoking his favorite passage from the constitution of the I.W.W. which had talked about building a new society within the shell of the old. Dorothy Day, *Peasant of the Pavements*, *in* By Little and By Little: The Selected Writings of Dorothy Day 40–48 (Alfred A. Knopf, 1983). More recently, Gabriel Metcalf has argued that CLTs and alternative institutions like carsharing and cooperatives are instances of "piecemeal change" that can eventually lead to something bigger, one alternative building on another to open up further possibilities for a better society. Gabriel Metcalf, Democratic by Design: How Carsharing, Co-Ops, and Community Land Trusts are Reinventing America 4 (Martin's Press, 2015).

104. That lack of political awareness is the reason that James DeFilippis, for one, has expressed doubts about CLTs producing social change. While conceding that CLTs and other community-based attempts to control work, housing, or money "provide a framework for ownership that is both equitable and viable," he notes the lack of an oppositional politics. People who are drawn to these models recognize their practices are different than the norm, but they don't see themselves or their organizations as doing anything politically significant. "Because of this," concludes DeFilippis, "even if these collectives continue to grow in number and public recognition, they are not likely to challenge capital unless the politics of those involved are transformed." James DeFilippis, Unmaking Goliath: Community Control in the Face of Global Capital 148–49 (Routledge, 2004).

her own CLT in doing both urban agriculture and affordable housing on community-owned land, "What we are really about, dear, is land reform, but we hide behind the tomatoes."

Such reticence is understandable. Any community land trust or, for that matter, any nonprofit developer must think twice about calling too much attention to unconventional (and potentially controversial) elements in its own make-up when the organization's leaders must continually beg for grants from public funders, apply for loans from private lenders, and anticipate attacks from reactionary neighbors opposed to anything being built near their own backyards.

Stealth has a price, however. When an innovation like community-owned land is cautiously kept out the limelight, it is simultaneously kept off the stage, waiting forever in the wings. To move from the periphery to the mainstream, however, and from pilot to policy, CLTs must be prepared to strut their stuff and prove their worth, proclaiming that *their* way of doing community development is preferable to the way it is normally done. Hiding behind the tomatoes may help a fledgling CLT to get established or enable a beleaguered CLT to survive, but it does little to demonstrate the comparative advantage of common ground. It does little to show that community-led development on community-owned land is not merely "just as good" as more conventional strategies of place-based development. It is often better.[105]

It is better because community land trusts are, at heart, more than simply another gimmick for lowering the cost of housing and cultivating a new crop of homeowners. What they are "really about" is equitably and sustainably replanting the contested ground at the intersection of property, power, and place. That may not be something to which all CLT practitioners aspire. That may not be something of which all CLT practitioners speak, at least not loudly. But the potential is inherently there whenever a community "owns itself" within the participatory framework of a community land trust to nudge the places where people reside toward greater security and opportunity for all. Common ground provides a versatile platform for promoting development with justice—and justice that lasts.

105. That is what most CLT practitioners privately believe, else they wouldn't put up with the extra toil and trouble. Many are reluctant to trumpet the superiority of the model they have adopted, however, a modesty that is prevalent among the practitioners of other models of shared equity homeownership as well. I believe such reticence to be a strategic mistake, as I've argued several times before. *See* John Emmeus Davis, *No Time for Timidity*, ROOFLINES (Aug. 27, 2012) http://www.rooflines.org/2824/no_time_for_timidity/ [https://perma.cc/SY6N-DFXW].

The Gig Economy & The Future of Employment and Labor Law

By Orly Lobel*

Sharing, Share-washing, & Gigs: Who's Afraid of On-Demand Employment?

ON-DEMAND EMPLOYMENT, also known as the Gig Economy, is growing at a rapid rate along with the supply of gig-workers who provide their labor on a short-term basis via digital platform technologies. In the United States, Uber alone has nearly half a million drivers in its fleet.[1] Uber's dazzling success further inspires gig-based business models. Venture capitalists report hearing dozens of pitches every week formulated as "*Uber but for X.*"[2] In each instance, the digital platform—the web of companies which utilize web technology—serves as the readily accessible meeting ground offering the performance of services by connecting workers to hirers to perform them. Gig workers are drivers, delivery-people, personal assistants, handymen, cleaners, cooks, dog-sitters, and babysitters, but increasingly are also more specialized professionals, including nurses, doctors, teachers, programmers, journalists, marketing specialists and, well yes, lawyers too. For example, the rising startup *InCloudCounsel*, offers an army of lawyers providing on-demand, routine legal services.[3] The technology is here: as long as you have the time, skill, knowledge, an empty couch, an unoccupied vehicle, or an idle lawnmower, you can swiftly become a

* Don Weckstein Professor of Law, University of San Diego. Thanks to Tristin Green, Carrie Menkel-Meadow, Rachel Arnow-Richman, Camille Rich, Leticia Saucedo, and Michelle Travis for their helpful thoughts. I thank Keia Atkinson and James deHaan for excellent research assistance. 12th Annual Pemberton Lecture at The 9th Circuit Court of Appeals.

1. Alex Rosenblat, *The Truth About How Uber's App Manages Drivers*, Harv. Bus Rev. (Apr. 6, 2016), https://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers [https://perma.cc/THB3-D7E8].

2. Micha Kaufman, *4 ways the on-demand economy will evolve in 2016*, VentureBeat (Jan. 2, 2016, 11:00 AM), http://venturebeat.com/2016/01/02/4-ways-the-on-demand-economy-will-evolve-in-2016/ [https://perma.cc/PS5A-E5PZ].

3. *See Company*, InCloudCounsel (Sept. 25, 2016, 2:08 PM), https://www.incloudcounsel.com/company [https://perma.cc/82A2-LSRG].

corporation. The platform economy channels anything and everything sitting idle into the market and monetizes it.

This resurrection of dead capital, including dormant human capital, is best understood in the context of the World Wide Web's genealogy. The present time finds the economy in a third phase of the Internet, which presents new regulatory challenges.[4] The first phase, Web 1.0, was about enabling search and access to information.[5] Web 2.0 was about selling things—books, music, file sharing.[6] Now, Web 3.0 is expanding the reach of the Internet to facilitate the selling of labor, effort, skills, and time.[7] Thus, just as a decade earlier Amazon and iTunes essentially eliminated the bookstores and record stores, and Amazon, along with eBay, thereafter expanded into an "Everything Store" and forever altered the retail industry,[8] the digital platform is now transforming service industries. *Everything Ubered* if you will. New digital platform companies are disrupting established markets for hotels, with Airbnb and Vacation Rentals by Owner ("VRBO); for transportation, with Lyft, Uber and Zipcar; and for home repair and cleaning services, with Handy and TaskRabbit. In turn, the rise of these digital platform services presents a multitude of conceptual and practical challenges for the law and public policy.

At the center of these legal challenges is the rise of instantaneous opportunities to work, or "gigs": the precarious nature of work and the uncertainty it casts upon employment and labor laws. The Gig Economy emerged in a perfect storm of several interrelated developments. Advances in digital technologies, the widespread availability of handheld devices, and ever-increasing high-speed connectivity have combined with the realities presented by several cycles of economic downturn, shifts in lifestyle, and generational preferences. As is often the case, this blend of factors has also revealed strong, polarized, bivalent reactions in public debates.

There are romantic accounts of the rise of the platform—those that celebrate its rise emphasize its immense potential to subvert entrenched business interests and industries ruled by quasi-monopolies.[9]

4. *See* Orly Lobel, *The Law of the Platform* 8–9 (Univ. of San Diego Sch. of Law Legal Studies Research Paper No. 16-212, 2016), http://digital.sandiego.edu/cgi/viewcontent.cgi?article=1000&context=law_fac_works [https://perma.cc/9Y22-WERP].

5. *Id.*

6. *Id.*

7. *Id.*

8. *See* Brad Stone, The Everything Store: Jeff Bezos and the Age of Amazon (1st ed., 2013).

9. *See* Lobel, *supra* note 4, at 13.

Under this view, the platform enables peer-to-peer exchanges without the dominant corporate hand taking an unfair cut. The reduction in intermediation, resulting from technological advances that diminish the need for a middleman, has the potential to create a more efficient and transparent labor market, which enables independence, choice, autonomy, and freedom for people to work according to their own terms, time, and desired lifestyle. According to this view, the platform increases economic efficiency, reduces idleness, and spurs both the entrepreneurial spirit and capital investment.[10] The platform also connects people directly, which brings us closer to the goals of being: "[M]ore inclusive and less distrusting . . . more democratized and less traditional . . . to help each other make better decisions about resources and waste less, and to harness the best aspects of the technology to do so."[11] Capitalism, according to this account, has the potential to incrementally become a fairer and more equitable system.

The darker account, however, provides an alarming analysis of a rising *uber*-capitalist (pun intended) system that commoditizes every interaction. No more giving a friend a ride to the airport if that ride has a price once you turn on your Uber app. No more helping your neighbor carry and assemble her new baby crib as that gig now has a price on Taskrabbit. Patricia Marx, in a clever *New Yorker* article titled "Outsource Yourself," describes her experience of hiring a Task Rabbit to purchase and deliver refreshments for her book group.[12] But when she falls behind in her reading, she hires a second Rabbit, this time a ghostwriter, to summarize the book for her (*Remembrance of Things Past*, a book by Proust).[13] Finally, as she frantically tries to be on time, she hires another Task Rabbit to bake the madeleines for the book club.[14] About the digital platform's impact on urban lifestyle, Marx writes:

> In the past several years, a cyber-marketplace has emerged that allows regular Joes to behave like dictators and celebrities. Part

10. *See* João E. Gata, *The Sharing Economy, Competition, and Regulation*, COMPETITION POL'Y INT'L 1, 3 (2015), https://www.competitionpolicyinternational.com/assets/Europe-Column-November-Full.pdf [https://perma.cc/S9EG-4E5A].

11. Lyndsey Gilpin, *We-commerce: The sharing economy's uncertain path to changing the world,* TECHREPUBLIC http://www.techrepublic.com/article/we-commerce-the-sharing-economys-uncertain-path-to-changing-the-world/ (last visited Feb. 9, 2016) [https://perma.cc/J8F6-RMJM].

12. *See* Patricia Marx, *Outsource Yourself: The online way to delegate your chores*, THE NEW YORKER (Jan. 14, 2013), http://www.newyorker.com/magazine/2013/01/14/outsource-yourself [https://perma.cc/67Y7-YAR9].

13. *Id.*

14. *Id.*

> Craigslist, part eBay, part wish lists of a spoiled child, these Web sites allow you to request goods and services from citizen venders, who can then bid on the opportunity to write a love letter to win back your ex-girlfriend; deliver chicken soup to your sick mother in Buffalo Grove, Illinois; file your insurance claim; assemble your Ikea Vallvik storage unit; or bring you sixty stuffed armadillos by Saturday.[15]

Leisure becomes work, work becomes leisure, socialization turns costly, and people price every interaction according to market value. Jobs become something that you constantly—and feverishly—seek with very little regularity or certainty. Robert Kuttner writes in *The American Prospect* in an article titled "The Task Rabbit Economy," that "the move to insecure, irregular jobs represents the most profound economic change of the past four decades."[16] Similarly, Robert Reich invites us to imagine an economy in which everyone is doing piecework at all hours, and no one knows when the next job will come or how much it will pay.[17] He asks, "What kind of private lives can we possibly have, what kind of relationships, what kind of families?"[18]

The rise of the platform economy has not only blurred the lines between work and leisure, but also threatens to transform once friendly, trust-based interactions into monetized transactions. Traditionally, a friend might buy you a drink on the assumption that you would later buy them a similar (if not identically priced) drink. In this interaction, the friend has demonstrated trust in your friendship by taking on the risk that you may never have an opportunity to return the favor, or that you may both forget. In the platform economy, however, apps like Venmo, digital wallets which allow cashless payments, give users the ability to instantly request payment for any financial extensions.[19] While the convenience and ease of cash-free financial transfers have drawn millions of users, the app also enables the stingy user to hold friends accountable for what would once have been an investment of kindness.[20] For example, now if a friend buys you an $8

15. *Id.*

16. Robert Kuttner, *The Task Rabbit Economy*, THE AMERICAN PROSPECT (Oct. 10, 2013), http://prospect.org/article/task-rabbit-economy [https://perma.cc/TD37-CBKF].

17. *See* Robert Reich, *The Share the Scraps Economy*, ROBERT REICH (Feb. 2, 2015), http://robertreich.org/post/109894095095 [https://perma.cc/N9FD-9W59].

18. Farhad Manjoo, *Uber's Business Model Could Change Your Work*, N.Y. TIMES (Jan. 28, 2015), http://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html [https://perma.cc/E56E-NGRG].

19. Kari Paul, *Venmo is turning our friends into petty jerks*, QUARTZ (May 19, 2016), http://qz.com/687395/venmo-is-turning-our-friends-into-petty-jerks/ [https://perma.cc/N6MM-765B].

20. *Id.*

drink and you later buy her a $6 drink, you can expect to be invoiced on Venmo for the $2 difference.[21]

In this economy, privacy too is diminished, because thriving in the "Gig Economy" commands building one's online profile and reputation. Over 450 million workers have posted their CVs on LinkedIn, and many find work through the network.[22] Other websites, such as Freelancer.com and Upwork, are specifically devoted to helping companies find contingent workers.[23] On the one hand, the ratings and review systems adopted by platform companies like Airbnb, TaskRabbit, and Lyft can create a system of stranger trust.[24] But at the same time, it brings us close to the ultimate Foucauldian panopticon, where the fear that every behavior is being observed compels individuals to not only take caution in their own actions but judge the transgressions of others.[25]

Perhaps most concerning of all, critics of the rise of the platform warn against the subversion of laws protecting those most vulnerable.[26] Directly rejecting the more optimistic account of a gentler, fairer digital economy, critics describe a subversive strategy of "sharewashing," where platform companies cosmetically rely on the romantic notion of a "sharing economy."[27] By recasting all customer-facing interactions as peer-to-peer transactions, companies mask their interests while avoiding corporate responsibilities toward, and liabilities for, workers and consumers.[28]

Life, as always, is more complex than these dichotomous understandings of platform utopia and dystopia. The Gig Economy is on the rise, but it is neither the end of work relations as we know them nor is it problem-free.

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21. *See id.*

22. Press Release, *About LinkedIn*, LinkedIn, https://press.linkedin.com/about-linked in [https://perma.cc/7E2T-5JTY].

23. *About Us,* Freelancer https://www.freelancer.com/about (last visited Nov., 2016) [https://perma.cc/JRN3-G584]; *About Us*, Upwork, https://www.upwork.com/about/ [https://perma.cc/J8P4-VCGW].

24. *See* Lobel, *supra* note 4, at 42–48.

25. Michel Foucault, Discipline and Punish 200–202 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

26. *See, e.g.,* Dean Baker, *Don't buy the 'sharing economy' hype: Airbnb and Uber are facilitating rip-offs*, The Guardian (May 27, 2014), http://www.theguardian.com/commentisfree/ 2014/may/ 27/airbnb-uber-taxes-regulation [https://perma.cc/KA8N-JDRR] (discussing Airbnb's evasion of various taxes and regulations).

27. Anthony Kalamar, *Sharewashing is the New Greenwashing*, Op Ed News (May 13, 2013), http://www.opednews.com/articles/Sharewashing-is-the-New-Gr-by-Anthony-Kala mar-130513-834.html [https://perma.cc/4D4R-4PCC].

28. *See id.*

What do Uber Drivers Want?

At the outset, it is important to recognize that, while the concerns about the future of employment and labor law with the rise of the Gig Economy are real, they are not unique to the digital platform. The rise of the contingent workforce precedes the rise of the platform. All individuals that work on a non-permanent basis as freelancers, contractors, temporary workers, and consultants are considered contingent workers. Currently, around 15 million people earn more than 40% of their income from the sharing economy.[29] More broadly, according to some measures, the contingent workforce now constitutes more than one-third of all employees, and analysts predict that it will rise to nearly half of the workforce by 2020.[30] The Government Accountability Office (GAO) recently found that approximately 40 percent of workers are contingent employees, defined broadly as anyone not in a standard full-time employment relationship.[31] These contingent employees include leased workers, temps, on-call and part-time workers, and the self-employed.

In other words, we could describe the Gig Economy—the model of working contingently—as older, and much more pervasive, than on-demand, online, digital platform-based work. The comparison between a traditional full-time position and contingent work online is therefore not currently the right one. Rather, the focus should be on the increasingly precarious realities that workers face both on and offline.

Only once more realistic comparisons are drawn can the questions about the status of platform workers be answered in a more nuanced way. Take the very contentious debate about the status of Uber drivers. In 2015, economist Alan Krueger and Uber partnered to research how working on the platform impacts drivers.[32] The study aggregated national data on driving schedules and earning, and con-

29. Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), http://time.com/4169532/sharing-economy-poll/ [https://perma.cc/T9YE-CX84].

30. Jeremy Neuner, *40% of America's workforce will be freelancers by 2020*, QUARTZ (Mar. 20, 2013), http://qz.com/65279/40-of-americas-workforce-will-be-freelancers-by-2020/ [https://perma.cc/GT5Y-KUQU]; Rachel Miller, *Half of all workers could be freelance by 2020*, STARTUP DONUT (June 26, 2015), http://www.startupdonut.co.uk/news/startup/half-of-all-workers-could-be-freelance-by-2020 [https://perma.cc/RF9S-2HV6].

31. Patty Murray & Kirsten Gillibrand, CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS, S. Doc No. GAO-15-168R, at 4 (2015), http://www.gao.gov/assets/670/669766.pdf [https://perma.cc/6SAZ-AAME].

32. Jonathan Hall & Alan Krueger, *An Analysis of the Labor Market for Uber's Driver-Partners in the United States* (Princeton Univ. Industrial Relations Section, Working Paper No. 587, 2015) http://arks.princeton.edu/ark:/88435/dsp010z708z67d.

ducted a survey of several hundred Uber drivers. For comparison, they also studied equivalent samples of taxi drivers and chauffeurs. Krueger concluded that most Uber drivers have turned to the platform, not because of the absence of other opportunities in the job market, but rather because of the flexibility and compensation the platform offers.[33] The majority of Uber drivers are employed full-time or part-time elsewhere and work for Uber for additional income.[34] Many Uber drivers find the flexible work schedule more appealing than the standard nine-to-five work schedule. The Krueger report also found that on average, Uber drivers work fewer hours and earn more per hour than traditional taxi drivers.[35]

Notably, just as there is a diversity of circumstances and preferences among Uber drivers, there is a broad spectrum of interests among digital platform workers. Turkers on Amazon's Mechanical Turk offers perhaps the most precarious digital work model. These workers complete minute tasks such as identifying artists on tracks and identifying photographs, have been referring to Jeff Bezos as the "boss" and demanding fair pay.[36] Most Etsy and eBay sellers, however, describe themselves as independent artisans or small business owners, rather than employees.[37] At the very least, we can say that gig workers are far from homogenous in their background, interests, and preferences. The diversity within their needs and work patterns suggests the nuance with which new regulation should approach reforming our traditional employment and labor laws to better serve contemporary realities.

Beyond Master-Servant: Four Proposals for Reform

What is the future of employment and labor law protections when reality is rapidly transforming the ways we work? What is the status of gig work and what are the rights as well as duties of gig workers?

33. *See id.* at 2.

34. *See id.* at 10.

35. *See id.* at 19; *see also Beat the Press: Ubernomics*, CTR. FOR ECON. & PUB. POL'Y (Jan. 23, 2015), http://www.cepr.net/index.php/blogs/beat-the-press/ubernomics [https://perma.cc/R4DH-L4CU] (noting critiques of this account).

36. Mark Harris, *Amazon's Mechanical Turk workers protest: 'I am a human being, not an algorithm'*, GUARDIAN (Dec. 3, 2014, 9:41 AM), http://www.theguardian.com/technology/2014/dec/03/amazon-mechanical-turk-workers-protest-jeff-bezos [https://perma.cc/3NLT-3YLH].

37. Noam Scheiber, *Uber Drivers and Others in the Gig Economy Take a Stand*, N.Y. TIMES (Feb. 2, 2016), http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html?_r=0 [https://perma.cc/9P2M-K7Q3].

I propose four paths for systematic reform, where each path is complementary rather than mutually exclusive to the others. The first path is to clarify and simplify the notoriously malleable classification doctrine; the second is to expand certain employment protections to all workers, regardless of classification, or in other words to altogether reject classification; the third is to create special rules for intermediate categories; and the fourth is to disassociate certain social protections from the work.

Simplify the Classification Test

Turning first to misclassification, platform companies like Uber insist on self-defining as merely apps or technology companies.[38] They describe themselves as malls or marketplaces for digital labor, serving simply a matching function, for example, between ride-seekers and drivers.[39] Most consistently, platform companies tend to define themselves negatively, emphasizing what they are not: they are not, they contend, employers.[40] Uber, for example, has stated that it:

> [D]oes not employ drivers, own vehicles or otherwise control the means and methods by which a driver chooses to connect with riders . . . it merely provides a platform for people who own vehicles to leverage their skills and personal assets and connect with other people looking to pay for those skills and assets.[41]

Uber refers to its drivers as "partners" to convey their non-employee status.[42] In 2015, for example Uber reported, "our partners have been paid over $3.5 billion in the [United States] so far this year."[43] Uber and Lyft have received the most media attention, due to their sheer scale and unicorn status. But the platform is changing the nature of work relations in a broad range of service industries, well beyond transportation. Similar legal disputes abound against platform companies offering delivery services of groceries, dry-cleaning, and

38. Salovitz v. Uber Tech., Inc., 2014 WL 5318031, at 1 (W.D. Tex. Oct. 16, 2014).

39. Carrie Melissa Jones, *Uber, Mint, and Square investor Rob Hayes shares what he looks for in community-driven startups*, VENTURE BEAT (Mar. 14, 2015), http://venturebeat.com/2015/03/14/uber-mint-and-square-investor-rob-hayes-shares-what-he-looks-for-in-community-driven-companies [https://perma.cc/JLD6-4ELQ].

40. *See Salovitz*, 2014 WL 5318031, at 1; Demid Potemkin, *Platform, Not Employer: Why the Uber ruling is bad for American entrepreneurship and innovation*, MEDIUM (July 7, 2015), https://medium.com/ondemand/platform-not-employer-53c05e4894d4#.qi68j3p4h [https://perma.cc/T98T-N43K].

41. *Salovitz*, 2014 WL 5318031, at 1.

42. *New Survey: Drivers Choose Uber for its Flexibility and Convenience*, UBER: NEWSROOM (Dec. 7, 2015), https://newsroom.uber.com/driver-partner-survey/ [https://perma.cc/8PYW-K4TQ].

43. *Id.*

take-out.[44] These cases are neither easy to analyze nor to apply in making clear predictions about employment status under current law.

Misclassification cases are difficult because the legal test used to determine employee status is notoriously messy.[45] Like a good law school hypothetical, the facts of each of these cases lend themselves to a cluttered balancing test. Take the Uber case: on the one hand, there are elements that point to independent contractor status—drivers supply the instrumentalities of their work (the cars), are paid by the job, and control their work hours, their geographic area for pickups, and whether to accept a passenger's request for a ride.[46] On the other hand, Uber sets the passenger pay rate, the method of pay, which passengers the drivers must pick up, and immediately displace drivers who fall below a 4.6 rating from the app.[47]

That said, early classification rulings have erred on the side of the worker. In June 2015, the California Labor Commissioner, citing the high degree of control Uber exercises over its drivers, ruled in an individual hearing that at least one driver of Uber was an employee.[48] In preliminary hearings in a class action against Uber, Judge Edward Chen in the Northern District of California found that because Uber sets the rates by which drivers are paid, screens them, and can terminate them, it weighs in favor of finding them to be employees.[49] In December 2015, Judge Chen issued a final order certifying the Uber drivers' case as a class action.[50] Initially, the defending company and plaintiff class proposed a settlement where the company agreed to pay

44. *See* Sarah Kessler, *The Gig Economy Won't Last Because It's Being Sued to Death*, FAST CO. (Feb. 17, 2015, 6:00 AM), http://www.fastcompany.com/3042248/the-gig-economy-wont-last-because-its-being-sued-to-death [https://perma.cc/9GVH-VT82] (discussing disputes over legal status of Gig Economy workers for Handy, Washio, Grubhub, Instacart, and Postmates).

45. *See generally*, 133 Am. Jur. *Trials* § 213 (2014) (discussing the difficulty of navigating the various tests to determine if a worker is an employee or independent contractor).

46. *See, e.g.*, Boston Cab Dispatch, Inc. v. Uber Tech., Inc., 2014 WL 1338148, at 2 (D. Mass. Mar. 24, 2014).

47. *See* James Cook, *Uber's internal charts show how its driver-rating system actually works*, BUSINESS INSIDER (Feb. 11 2015), http://www.businessinsider.com/leaked-charts-show-how-ubers-driver-rating-system-works-2015-2 [https://perma.cc/5X6Q-GYVT].

48. *See* Lauren Weber & Douglas MacMillan, *Uber Driver Was Employee, Not Independent Contractor, California Commission Says*, WALL ST. J. (June 17, 2015), http://www.wsj.com/articles/uber-driver-was-employee-not-contractor-california-commission-says-1434557958 [https://perma.cc/Z592-K6CF].

49. Karen Gullo, *Uber and Lyft Drivers May Have Employee Status, Judge Says*, BLOOMBERG TECHNOLOGY (Jan. 30, 2015, 5:46 PM), http://www.bloomberg.com/news/articles/2015-01-30/uber-drivers-may-have-employee-status-judge-says [https://perma.cc/LCT5-QGWD].

50. *See* UBER LAWSUIT, http://uberlawsuit.com (last visited Jan. 12, 2016) [https://perma.cc/JS6H-L99H].

$100 million and to allow drivers to contest their termination from the platform.[51] Judge Chen, however, rejected the settlement agreement in mid-August of 2016 because it low-balled the claims—estimating the total value closer to $1 billion.[52] Additionally, Uber failed to convince the judge that its changing tipping policy would plausibly increase drivers' incomes.[53] The company gained a victory in early September when the Ninth Circuit overturned Judge Chen's initial ruling on the matter and upheld Uber's arbitration clauses as valid and enforceable under California law.[54] The status of Uber drivers as employees or independent contractors remains in limbo, but in early October, New York State Department of Labor shed some light on the issue when it held that two former drivers are eligible for unemployment insurance claims.[55] The disposition of the majority of the current misclassification cases varies, though most are still active: Shyp, Instacart, Handy, DoorDash, and Caviar are all in arbitration, whereas Washio, Postmates, and Grubhub are currently pending in court.[56]

51. Rebecca Spalding, *Uber settlement attacked by drivers saying lawyer sold out*, CHICAGO TRIBUNE (May 14, 2016, 8:14 PM), http://www.chicagotribune.com/news/sns-wp-blm-uber-a4631fc0-1944-11e6-971a-dadf9ab18869-20160513-story.html [https://perma.cc/G5SG-EVR4]. At the time, the lead plaintiffs' attorney, Shannon Liss-Riordan, faced heavy criticism from objecting drivers who claimed she sold them out for a settlement agreement that was far below the value of the lawsuit at trial; *Id.* More than twenty filed objections significantly delayed the approval process of the settlement agreement; *Id.* For more information on Shannon Liss-Riordan and the atmosphere in Silicon Valley surrounding the pending settlement; *see generally* Diana Kapp, *Uber's Worst Nightmare*, SAN FRANCISCO MAGAZINE (May 18, 2016), http://uberlawsuit.com/Uber's%20Worst%20Nightmare.pdf [https://perma.cc/7Y3R-G6YR].

52. *See* Joel Rosenblatt, *Uber's $100 Million Driver Pay Settlement Rejected by Judge*, BLOOMBERG (Aug. 18, 2016, 5:30 PM), https://www.bloomberg.com/news/articles/2016-08-18/uber-s-100-million-driver-pay-settlement-is-rejected-by-judge [https://perma.cc/9JF6-J3UN].

53. *See id.*

54. *See* Joel Rosenblatt & Patricia Hurtado, *Uber Gains Leverage Against Drivers with Arbitration Ruling*, BLOOMBERG (Sep. 7, 2016), http://www.bloomberg.com/news/articles/2016-09-07/uber-wins-partial-appeals-court-victory-over-arbitration-pacts [https://perma.cc/5ZY6-QJJC]. The driver class petitioned the 9th Circuit for en banc review of its decision arguing that the arbitration agreements were void under federal labor law and that the court must assume that drivers are employees when making its determination. *See* Matthew Guarnaccia, *Uber Arbitration Clauses Unenforceable, 9th Cir. Told*, LAW 360 (Oct. 13, 2016, 7:19 PM), http://www.law360.com/articles/851309/uber-arbitration-clauses-unenforceable-9th-circ-told [https://perma.cc/D66H-UC39].

55. *See* Noam Scheiber, *Uber Drivers Ruled Eligible for Jobless Payments in New York State*, N.Y. TIMES (Oct. 12, 2016), http://www.nytimes.com/2016/10/13/business/state-rules-2-former-uber-drivers-eligible-for-jobless-payments.html?_r=0 [https://perma.cc/6UGN-KGUA] (one of the claimants was a former Uber and Lyft driver).

56. Marissa Kendall, *The Uber settlement provides payout, no closure*, SAN JOSE MERCURY NEWS (April 22, 2016), http://www.mercurynews.com/breaking-news/ci_29802852/uber-settlement-provides-payout-no-closure [https://perma.cc/GKA7-8WZF].

While mushrooming lawsuits indicate the highly-contested nature of work on the platform, these employment law issues are far from unique to the platform. Nearly a century after the passage of the Fair Labor Standards Act ("FLSA"), uncertainty about the boundary separating covered employees and independent contractors is as high as ever. In my article *The Four Pillars of Work Law*, I describe how, for decades, the classification of employees versus independent contractors proved one of the most notoriously unpredictable, blurry, and malleable legal tests, consisting of anywhere from three to as many as twenty factors, depending on which case or regulatory guidance is applied.[57] The twenty-factor test established by the IRS has been the most consistently used, and determines employment status by examining the level of control over the worker (e.g. whether the worker was trained or provided their own training, whether the worker provided their own tools, the method and rate of payment, whether the worker has control over scheduling, the opportunity for profit and loss, the degree of supervision).[58] In the Gig Economy, the distinction between independent contractor and employee continues to present definitional challenges and reveals the pervasive practical difficulty in applying the multi-factor test.

Consider drivers again as an example. Analyzing the lawsuits against Uber and Lyft requires the recall of previous lawsuits filed by taxi drivers, who were operating under the conventional pre-platform model. These suits over drivers' employment statuses were fought similarly and largely lost.[59] Today, taxi drivers are largely classified as independent contractors.[60] Recently, FedEx, also a pre-platform delivery service, lost several class action suits for misclassifying its drivers as independent contractors.[61] All of these cases entail very context-specific factors, rendering the battles over employment status online and offline virtually identical. In other words, the problem at the heart of classification disputes is not the newness of the Gig Economy, but rather the inherent complexity of the existing legal classification. Indeed, I often tell my students that to get a sense of the range of laws, statutes, and regulations from local government to international law,

57. Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539 (2006).

58. *Present Law and Background Relating to Worker Classification for Federal Tax Purposes*, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-utl/x-26-07.pdf [https://perma.cc/VMR7-66QH].

59. *See, e.g.*, Ali v. U.S.A. Cab Ltd., 176 Cal.App. 4th 1333, 1539 (2009).

60. *See, e.g., id.* at 1337 (plaintiffs "alleging USA Cab's leases wrongfully classified lessees as independent contractors rather than employees").

61. *See* Alexander v. FedEx Ground Package Serv., 765 F.3d 981, 997 (9th Cir. 2014).

from financial regulation to family law, one can simply create a map pinpointing all of the places in which the term employee appears.

In a pre-platform case concerning the classification of migrant workers in one of the oldest economic industries—agriculture—Judge Frank Easterbrook shrewdly questioned how, decades after the passage of the FLSA, we still cannot predict the status of workers with any certainty.[62] The tests developed under the common law are notoriously incremental, applied case-by-case, reliant on multiple weighted factors, and frequently reject the labels adopted by the contracting parties. Judge Easterbrook rejected the common law right to control test, which weighed multiple factors, including method of payment, but he also viewed the term economic dependence used by the majority as rather tautological: the labor market creates inherently relational settings in which both sides are mutually dependent.[63] Instead, Easterbrook urged the adoption of a broad economic vulnerability test, at least for the purposes of wages and hour laws.[64] In a way, Easterbrook's reliance on the idea of labor market vulnerability is a standard reminiscent of our test for pornography: *I know it when I see it*.[65] Easterbrook's decision reads as a blueprint for leaving the hamburger flippers and farmworkers vulnerable, while protecting the engineers and lawyers. The Fair Labor Standards Act, a Depression Era New Deal policy designed to protect those most in need, was meant to cover the former. While changing realities may easily shift perspective on vulnerability in any given era and industry, the idea behind a simplified, broader coverage test harkens back to the very purpose of the laws—social policies were meant to have broad coverage, protecting society's most vulnerable segments.

On July 15, 2015, the Department of Labor ("DOL") issued guidance on the classification of independent contractors in response to the wave of worker misclassification issues arising from the explosion

62. *See* Secretary of Labor, U.S. Dept. of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring) ("Are cucumber pickers "employees" for purposes of the Fair Labor Standards Act? Donovan v. Brandel [citation omitted] says "no" as a matter of law. My colleagues say "yes" as a matter of law. Both opinions march through seven "factors"—each important, none dispositive.").

63. *See id.* at 1539, 1541–42.

64. *See id.* at 1543–45 (saying that "economic reality" should be dispositive over "contractual form" and advocating that migrant workers should not be kept "in the dark" from the protections of employee status).

65. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).

of the Gig Economy.[66] The DOL referenced the definition contained within the FLSA for what constitutes employment— "to suffer or permit work"[67]—which is, for all intents and purposes, a very broad standard. The DOL's guidance effectively expands the worker protections included in the FLSA by narrowing the grounds under which a worker qualifies as an independent contractor. This action created a new classification guide, with a six-factor test based on the "economic realities" doctrine developed at common law.[68] Under this doctrine, most workers are considered employees for the purpose of FLSA and federal protected-leave laws.[69]

From Misclassification to Non-Classification

A second path for reform is to make some issues classification-neutral. With origins in Master-Servant law, modern employment law is based on the assumption of two worlds of work: you are either an employee or you are not, and if not you have none of the protections afforded to employees. Normatively, with respect to a number of fundamental rights, there should be an extension of protections to all workers, irrespective of employment status. Legislation has already extended certain speech rights, for example whistleblowing and anti-retaliation protections under financial statutes like Dodd-Frank and Sarbanes-Oxley, to all workers.[70] These speech protections were put into place because, in their absence, employers could simply utilize novel contract language or work arrangements to avoid extending these protections, defeating the underlying policy aims. Similarly, lawmakers should extend the principles of dignity and equality embedded in anti-discrimination laws to all laborers, regardless of their employment status, in order to achieve the purposes of statutory discrimination prohibitions on the basis of race, color, national origin, sex, religion, age, and disability. Title VII was enacted to bring fundamental constitutional principles from state action into the private

66. *See* U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1 (July 15, 2015), https://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm [https://perma.cc/S2EB-VZCW].

67. *See id.*

68. *See id.*

69. *See id.*

70. *See generally,* M. Megan O'Malley, *Whistleblower Protections, Retaliation Issues, and Investigative Issues Arising Under the Sarbanes-Oxley Act and the Dodd-Frank Act*, Am. Bar Ass'n Annual Meeting, (July 31, 2015), http://www.americanbar.org/content/dam/aba/events/labor_law/am/2015/omalley.authcheckdam.pdf [https://perma.cc/H8M2-7KCP] (focusing on whistleblower protections and anti-retaliation laws related to SOX and Dodd-Frank).

market.[71] Whether an Uber driver is a worker or independent contractor should not matter when prohibiting a company like Uber to make recruitment decisions based on sex, race, and other prohibited identity categories.

Some state laws have already expanded anti-discrimination protections to all workers, including independent contractors. For example, the Washington Law Against Discrimination ("WLAD") sets the standard for prohibitions against discrimination against workers regardless of status with an expansive definition of "employee."[72] In *Marquis v. Spokane*,[73] a female golf professional sued the city, alleging she was subject to sex discrimination while managing one of the city's golf courses. The Washington State Supreme Court construed the state anti-discrimination statute more broadly than federal statutes due to the statute's definition of employee, determining it only excludes immediate familial employment relationships but includes all other worker relationships.[74] Similarly, in *D'Annunzio v. Prudential*,[75] the New Jersey Supreme Court extended whistleblower protection to the plaintiff in spite of the fact his employment contract explicitly classified him as an independent contractor.

With an expansive coverage of anti-discrimination laws, the digital platform provides an opportunity to upgrade compliance with anti-discrimination policies. The modern age offers a number of tools to combat the issue of workplace discrimination in hitherto unforeseen ways. Technology exists to detect patterns of discrimination better, opening up new avenues of research and enforcement for the pertinent regulatory agency. This would require that regulatory agencies more actively enforce data mining and reporting, but the potential gains in minimizing the effect of unlawful discrimination are incalculable.

A Class of Their Own

For other areas of regulation, such as collective bargaining and health and safety, the law should recognize an intermediate category

71. Norman C. Amaker, *Quittin' Time?: The Antidiscrimination Principle of Title VII vs. the Free Market (*reviewing Forbidden Grounds: The Case Against Employment Discrimination Laws *by Richard A. Epstein),* 60 CHI. LAW REVIEW 2 (Mar. 1, 1993), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=4834&context=uclrev [https://perma.cc/9N2M-YY7Q].

72. *See* WASH. REV. CODE § 49.60.040(10) (2015).

73. Marquis v. City of Spokane, 130 Wash.2d 97 (Wash. 1996).

74. *See id.* at 50.

75. D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 123 (N.J. 2007).

of worker between employee and independent contractor. Even if the law simplified the classification test, the resulting on-off dichotomous space does not allow middle ground between the categories. As Judge Vince Chhabria said in the Lyft hearing, the jury "will be handed a square peg and asked to choose between two round holes."[76]

In Canada, when an independent contractor has worked exclusively or largely exclusively for one client for an extended period, they are deemed a *dependent contractor* for purposes of termination notification and representation.[77] Former Chairwoman of the National Labor Relations Board ("NLRB") Wilma Liebman called upon the United States to recognize such a category in the dissent of the NLRB opinion *St. Joseph News-Press*, noting that Canada and Germany already have statutes protecting these types of workers.[78] Liebman stated, "Some people are clearly independent contractors and some are clearly employees, but a third category becomes necessary when you have people who are borderline," independent in terms of task selection while being economically dependent on one employer.[79] A classic example perfectly encapsulating this issue occurred in *Vizcaino v. Microsoft*,[80] in which the court declared employees, who called themselves "permatemps,"[81] were actual employees rather than independent contractors.[82] Microsoft eventually settled with these permatemps for $97 million which functionally served as full employee benefits and back pay.[83] Unfortunately, this ruling has not created a true change in

76. Ellen Huet, *Juries to Decide Landmark Cases Against Uber and Lyft*, FORBES: TECH (Mar. 11, 2015, 8:21 PM), http://www.forbes.com/sites/ellenhuet/2015/03/11/lyft-uber-employee-jury-trial-ruling/#68c39d762446 [https://perma.cc/FS4S-TH2N].

77. *See, e.g.*, Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for Dependent Contractors*, 26 BERKELEY J. EMP. & LAB. L. 143, 149 (2014); *see also* Harry Campbell, *Could Dependent Contractors Be The Answer For Uber?*, FORBES (June 19, 2015, 6:05 PM), http://www.forbes.com/sites/harrycampbell/2015/06/19/could-dependent-contractors-be-the-answer-for-uber/ [https://perma.cc/5QSH-AM97] (evaluating the likelihood of Uber using the dependent contractor classification: "Switching to an employee only model would be bad for both parties though so the only logical step seems to be a compromise of the two that affords drivers some of the benefits of traditional employment but also allows them to retain a semi-flexible schedule.").

78. Lauren Weber, *What if There Were a New Type of Worker? Dependent Contractor*, WALL ST. J. (Jan. 28, 2015), http://www.wsj.com/articles/what-if-there-were-a-new-type-of-worker-dependent-contractor-1422405831 [https://perma.cc/TVY9-YU47].

79. *Id.*

80. Vizcaino v. Microsoft, 173 F.3d 713 (1999).

81. Steven Greenhouse, *Temp Workers at Microsoft Win Lawsuit*, N.Y. TIMES (Dec. 13, 2000, 7:01 PM), http://www.nytimes.com/2000/12/13/business/technology-temp-workers-at-microsoft-win-lawsuit.html [https://perma.cc/J4RM-D9CG].

82. *See Vizcaino*, 173 F.3d at 724–725.

83. *See* Greenhouse, *supra* note 81.

Microsoft's policy of hiring temporary workers. Instead of labeling these workers employees, they simply remove building and network access for six months after they have worked an eighteen-month period.[84] This kind of regulatory arbitrage reveals the need for a third category that would identify the protections afforded to workers laboring under intermediate arrangements.

Seth Harris, who served as Secretary of Labor under President Obama, and Alan Krueger suggest another such intermediate category, that they call "independent workers," and urge that they receive rights to organize and collectively bargain.[85] Workers in this category have in fact begun organizing for mutual aid to protest terms and conditions. Notably, the taxi industry, which shifted its business model a few decades ago from classifying its drivers as employees to independent contractors,[86] has been at the forefront of organizing independent contractors, who the National Taxi Workers Alliance now represents.[87] On the digital platform, Postmates delivery workers began a campaign called "I'm done after this delivery," protesting a widely-held fear that turning down jobs affects future assignments.[88] In December 2015, the Seattle City Council granted ride-hailing drivers the right to unionize.[89] Though the issues are somewhat different from turn-of-the-century labor organizers, workers are voicing a twenty-first-century basis for the interests of Gig Economy laborers to collectively protest and organize. In several cities, including San Fran-

84. Kelly Clay, *Why Microsoft's Layoff Is Much More Sweeping Than The 18,000 Cuts*, FORBES (July 20, 2014), http://www.forbes.com/sites/kellyclay/2014/07/20/microsoft-layoffs-also-impact-thousands-of-contractors/#6e5ac8902c11 [https://perma.cc/M8JM-KUNZ].

85. *See* Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"*, THE HAMILTON PROJECT (2015), http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf [https://perma.cc/U6XE-CEUR].

86. *Preliminary Findings Taxi Driver Labor Market Study: Long Hours, Low Wages*, CITY OF PORTLAND REV. BUREAU, OFFICE OF MGMT. AND FIN. 12 (2012), http://www.portlandmercury.com/images/blogimages/2012/02/08/1328736937-taxi_driver_market_review.pdf [https://perma.cc/JJD3-42YF].

87. *See* Sarah Kessler, *Taxi and Uber Drivers, Once Mortal Enemies, Join Forces in New Labor Dispute*, FAST COMPANY (Feb. 19, 2016), https://www.fastcompany.com/3056857/taxi-and-uber-drivers-once-mortal-enemies-join-forces-in-a-new-labor-dispute [https://perma.cc/M3GZ-98VH].

88. *See* Noam Scheiber, *Uber Drivers and Others in the Gig Economy Take a Stand*, N.Y. TIMES (Feb. 2, 2016), http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html [https://perma.cc/YT2P-3ZWD].

89. *See* Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 4, 2015), http://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html [https://perma.cc/3S3R-EGKL].

cisco, as well as Dallas, New York, and Tampa, Uber driver protests have resulted in the reversal of certain policies cutting rates.[90] Antitrust laws should be amended to allow non-employee workers to organize, including into worker cooperatives.

In addition to organizing, worker safety laws should extend to the hybrid employee-independent contractor. The Occupational Safety and Health (OSH) Act of 1970 put a system of regulation designed to improve safety conditions for workers into place.[91] It did so by requiring employers to comply with the rulemaking bodies established by the act, including allowing inspections by the Occupational Safety and Health Administration ("OSHA") enforcement personnel employed by the Department of Labor, reporting accident statistics, and payment of any fines or penalties in the event of a violation.[92] The purpose of the act, put simply, is to protect workers from potentially hazardous conditions in order to prevent injury or death. Without OSHA protections, dependent contractors find themselves particularly vulnerable. They are workers exposed to the hazards of a job site without having the necessary control over it to ameliorate those risks. From the employer's perspective, extending certain safety protections will incentivize them to provide particular benefits under the logic of efficiencies of scale, including insurance, worker compensation, and pensions for a group, as well as assistance with tax withholdings. Employers could provide these benefits without the corresponding fear of offering their workers other employment rights such as wage and hour, overtime, and leave rights. This approach also avoids the moral hazard created by the lack of control: turning a blind eye to risks because of the fear of wholesale classification as an employer.

One example of a bargain struck between workers and platform companies that fits an intermediate treatment of work status is the very recent settlement between Lyft drivers and Lyft. The drivers agreed to drop their misclassification claim in return for better terms of service.[93] Under these new terms, drivers can no longer be terminated for any reason without warning and without opportunity to fix the problem. The settlement also established a regular grievance pro-

90. *See* Scheiber, *supra* note 88.

91. *See generally* Jon M. Philipson, *OSHA's Impact on Tort Litigation by Independent Contractors' Injured Employees Against Business Premises Owners*, 66 U. MIAMI L. REV. 987, 992 (2014) (discussing Congress' objectives in enacting the OSH Act).

92. *See id.* at 993.

93. *See* Carolyn Said, *Lyft drivers to remain contractors in lawsuit settlement*, SF GATE (Jan. 27, 2016), http://www.sfgate.com/business/article/Lyft-drivers-to-remain-contractors-in-lawsuit-6787390.php [https://perma.cc/T52G-UMJE].

cedure that would allow Lyft drivers to bring pay disputes at the expense of the company.[94] The Lyft case was settled in January of 2016, with a settlement of $12.25 million to the drivers and an agreement to provide drivers with a due process hearing before terminating them.[95] Although the drivers did not get full-fledged employee status, they did get better terms of employment—shifting from what could be understood as at-will termination to a process that requires good cause.[96] Notably, the court rejected the settlement amount for being too low, forcing the parties back to the drawing board.[97] Judge Chhabria only gave preliminary approval for the settlement agreement after Lyft increased its offer from $12.25 million to $27 million and increased the non-monetary benefits to drivers.[98]

There are those who fear the middle category, expressing concern that "creating an entirely new category of worker would not only be politically and logistically tortuous, it would also risk depriving workers who would otherwise be classified as employees of the benefits they might enjoy."[99] And yet, the reality is that existing law no longer protects a growing number of workers who once would have enjoyed the status of employees, regardless of the existence of an intermediate category. Rather, these workers are classified as independent contractors with very few rights, and the lack of any intermediate status effectively provides greater incentives for employers to reclassify their workers as independent contractors. In other words, the fact that contemporary employment and labor law has distilled worker protection into a debate about the two categories is endogenous to the growing independent contractor category.

Moreover, the lack of an intermediate category induces a paltry investment in skills. Recognizing the inherently mobile realities of gig

94. *See* David William, *Lyft Settles Its Employee Misclassification Lawsuit, but Uber's Still Pending*, SMALL BIZ TRENDS (Feb. 1, 2016), http://smallbiztrends.com/2016/02/lyft-employee-misclassification-lawsuit.html [https://perma.cc/2GE8-LD59].

95. *See id.*

96. *See id.*

97. *See* Tracey Lien, *Judge rejects $12.25-million Lyft lawsuit settlement*, L.A. TIMES (April 7, 2016, 7:03 PM), http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-20160408-story.html [https://perma.cc/KX7B-TTQP]; Dan Levine, *Lyft agrees to revised $27 million deal in driver lawsuit*, REUTERS (May 11, 2016, 10:55 PM), http://www.reuters.com/article/us-lyft-lawsuit-drivers-idUSKCN0Y22PJ [https://perma.cc/A9CU-72DM].

98. *See* Tracey Lien, *Judge Approves Lyft's $27-Million Class-Action Settlement with Drivers*, L.A. TIMES (June 23, 2016), http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-approval-20160623-snap-story.html [https://perma.cc/LUU3-7439].

99. Noam Scheiber, *A Middle Ground Between Contract Worker and Employee*, N.Y. TIMES (Dec. 10, 2015), http://www.nytimes.com/2015/12/11/business/a-middle-ground-between-contract-worker-and-employee.html?_r=1 [https://perma.cc/EZU2-4JJN].

workers could allow us to better interpret the duties of loyalty and post-employment restrictive contracts that employers regularly demand. In my book *Talent Wants to be Free*, I describe the exponential expansion of restrictive covenants in employment—where employers in nearly every industry require their workers to sign non-competes, non-disclosure agreements, and pre-innovation assignment clauses.[100] From a human capital perspective, it would make sense to increase the protections over dependent contractors' mobility, parallel gig employment with two or more competitors, ownership over skills and knowledge, all to a higher level than that of employees, who enjoy more job security in return for some constraints over their future competition with their employer. Notably, in some cases, platform work seems to follow this logic. Uber and Lyft have allowed their drivers to work for their primary competitor,[101] presumably in part to signal their non-employee status, but also in part to recruit workers who are not seeking full-time employment with only one company.

Platform Work and the Social Contract: Delinking Welfare from Work

The final path to systemic reform is rethinking some of the historical links between work and welfare. I come from a social welfare country, and I have the perspective that there is no natural exclusive link between social welfare and employment. In the United States, the social contract has historically placed the proper delivery social welfare program benefits, including the safety net, unemployment insurance, workers' compensation, health care, and pensions/retirement savings, through the workplace.

Here, the Dutch concept of "flexicurity," which provides comprehensive, lifelong learning strategies and modern social security systems providing adequate income to support flexible work patterns, is an important model.[102] In the United States, most benefits are linked

100. Orly Lobel, Talent Wants to be Free 51–53 (2013).

101. *See, e.g.*, Scott Van Maldegiam, *How to Drive for Uber and Lyft at the Same Time*, The Rideshare Guy, http://therideshareguy.com/how-to-drive-for-uber-and-lyft-at-the-same-time/ [https://perma.cc/LPA2-Y7KK]; Harry Campbell, *How Can I Run Uber and Lyft at the Same Time?*, Maximum Ridehsaring Profits, http://maximumridesharingprofits.com/how-can-i-run-uber-and-lyft-at-the-same-time/ (last visited Nov. 17, 2016) [https://perma.cc/HX72-AP4K]. This was not always the case though, as Uber told its New York City drivers in 2014 to stop driving for Lyft. *See* Erica Fink, *Uber threatens drivers: Do not work for Lyft*, CNN (Aug 5, 2014, 4:26 PM), http://money.cnn.com/2014/08/04/technology/uber-lyft/ [https://perma.cc/S5MG-4M66].

102. *See generally* Tom Wilthagen & Frank Tros, *The concept of 'flexicurity': a new approach to regulating employment and labour markets*, 10 Transfer: European Review of Labour and

to employment, including health care, retirement, workers' compensation, and leave. This link is increasingly outdated and creates the moral hazard of a further push to labor supplied by independent contractors and workers. Within the United States, the on/off nature of employment, and the fact that the very existence of so many rights and responsibilities depends on employment status, impedes the spread of pre-existing social welfare benefits. The law should apply the social safety net universally, and fund it through the tax system, rather than through employment.

The Affordable Care Act of 2010 is a step in the right direction and has made it easier for independent contractors to purchase insurance on their own,[103] but delinking social benefits from the employment relationship demands much more work. Indeed, in some ways, HealthCare.gov[104] has become a human-resources site for the platform economy. By allowing workers without static employment to obtain affordable, high-quality healthcare coverage outside of traditional employer plans, workers are free to pursue a number of different means of employment, including entrepreneurship in addition to piece-work. In other words, new laws can renew the deals of the New Deal of ensuring social welfare, fairness, and the promise of upward mobility by expanding protections, rather than focusing on categories and classes of workers,[105] thereby piercing the veil of these laws to reach the fundamental principles that form our social contract.

Nobel Laureate Wassily Leontief offers a thought experiment: imagine a jobless economy.[106] An economy in which production is so efficient and so automated that there remains only one worker. How would we then distribute the wealth? How would we organize produc-

RESEARCH 169, 169 (2004) (defining flexicurity as "[a] policy strategy that attempts, synchronically and in a deliberate way, to enhance the flexibility of [labor] markets, work [organization] and [labor] relations on the one hand, and to enhance security—employment security and social security—notably for weaker groups in and outside the [labor] market, on the other hand.").

103. Steven Cohen & William B. Eimicke, *Independent Contracting: Policy and Management Analysis*, COLUMBIA UNIV., SCH. OF INTERNATIONAL AND PUBLIC AFFAIRS, (Aug. 2013) at 48, http://www.columbia.edu/~sc32/documents/IC_Study_Published.pdf [https://perma.cc/V8CS-8875].

104. HEALTHCARE, https://www.healthcare.gov (last visited Jan. 2, 2016) [https://perma.cc/V3WA-UEA7].

105. *See generally* Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

106. Robert Kuttner, *The Robots Are Coming! The Robots Are Coming!*, HUFFINGTON POST (May 24, 2016), http://www.huffingtonpost.com/robert-kuttner/the-robots-are-coming_b_7432126.html [https://perma.cc/6PNA-CKFB].

tive human activities? These basic distributive questions should already be on the table.

Conclusion

The deeper questions about the desirability of commoditizing every aspect and minute of one's life, labor, skill, and energy have become more pressing and salient with the rise of the platform. Just-in-time scheduling makes life less predictable, and the rhythms of society more stochastic.[107] Work is scheduled by the hour, and in some cases, even minutes. Is the platform further destabilizing job security and long-term employment? Is it a cause or symptom of the shifting patterns of the labor market? The answer is both. The rise of the platform is partly due to the decline of full-time, long-term jobs and cycles of high unemployment rates.[108] It also represents a shift in preferences as many people entering the labor market today prefer flexibility and control over their work time. The platform also offers opportunities to profit more directly from one's labor.[109] Compared to workers employed through manpower agencies, platform companies allow workers to receive a greater share of the pay.[110]

To close with an optimistic perspective, the platform may also be an opportunity to connect workers to each other and organize in ways previously unavailable. Platform technology lowers barriers of entry,

107. *See generally* Orly Lobel, *The Law of Social Time*, 79 TEMP. L. REV. 357, 357 (2003) (examining the law's role in shaping time management and the implications of time "increasingly being treated merely as a commodity that must be distributed efficiently").

108. *See* Rick Wartzman, *This is the Backup Career for More and More U.S. Workers*, FORTUNE (Sept. 30, 2016, 6:00 AM), http://fortune.com/2016/09/30/gig-economy-u-s-unemployment/ [https://perma.cc/5C2J-784Q]; *see generally PayChecks, Paydays, and the Online Platform Economy*, J.P. MORGAN & CHASE (Feb. 2016), https://www.jpmorganchase.com/corporate/ institute/document/jpmc-institute-volatility-2-report.pdf [https://perma.cc/5ZJF-JZWL].

109. *See PayChecks, Paydays, supra* note 108, at 20; *see also* Emily Fetsch, *Millennials and the Platform Economy*, KAUFFMAN FOUND. (Aug. 16, 2016), http://www.kauffman.org/blogs/growthology/2016/08/millennials-and-the-platform-economy [https://perma.cc/EN74-3VKP] (discussing how the platform economy is benefiting millennials, who have "struggled to find full-time work and values a work-life balance.").

110. Maids, for example, make $15 to $22 an hour on the platform "Handy;" HANDY, https://www.handy.com (last visited Dec., 2016) [https://perma.cc/B5UN-D9YZ]. Jeff John Roberts, *Is a Maid an Employee? Looking for a Third Way in on the Demand Economy*, FORTUNE (Feb. 10, 2016, 2:40 PM), http://fortune.com/2016/02/10/maid-employee-on-demand/ [https://perma.cc/3EQ8-CC52]. While the national median hourly wage for traditionally-employed maids is $9.97, and the 90th percentile is $16.05. *Occupational Employment and Wages, May 2015: Maids and Housekeepers*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, http://www.bls.gov/oes/current/oes372012.htm (last visited Nov. 17, 2016) [https://perma.cc/HU8W-RKSQ].

and so we might imagine that discontent and connectivity could lead workers to create cooperative versions of companies like Uber, TaskRabbit, and Mechanical Turk. We might also envision a driver-owned transportation platform cooperative that adopts Uber-like technology, fueled by the energy of creative cause lawyers.[111] The platform enables "ridiculously easy group-forming," which "matters because the desire to be part of a group that shares, cooperates, or acts in concert is a basic human instinct that has always been constrained by transaction costs."[112] One such initiative is Peers,[113] an organization for platform economy workers and an advocacy group for the platform economy that provides services to its members, such as personal liability protection for homes and replacement cars for drivers.[114] Peers is planning on expanding its services to include workers' compensation insurance.[115] Peers describes itself as a "grassroots organization" with the goal to "mainstream, protect, and grow the sharing economy," and already has over 11,000 members and dozens of corporate partnerships.[116] Other local groups of users are forming to share advice, think about policy, push risk and responsibilities back from the individual provider to the platform company, and standardize pricing.[117]

111. *See generally* Janelle Orsi, Practicing Law in the Sharing Economy: Helping People Build Cooperatives (2013) (discussing how transactional lawyers can contribute to a sharing economy that supports locally sustained social enterprises).

112. Clay Shirky, Here Comes Everybody: The Power of Organizing Without Organizations 54 (2008).

113. Peers, http://www.peers.org (last visited Nov. 17, 2016) [https://perma.cc/DSG8-CLPA].

114. *See* Ellen Huet, *Peers Launches Home Liability and Car-Replacement Insurance for Airbnb, Uber, Lyft Workers*, Forbes (Dec. 4, 2014 6:00 AM), http://www.forbes.com/sites/ellenhuet/2014/12/04/peers-home-liability-car-replacement-insurance/#4d200e7060f9 [https://perma.cc/LKJ3-QEUY].

115. *See* Dana Hull, *Peers unveils products for workers in the sharing economy*, Mercury News (Dec 3, 2014 10:41 AM), http://www.mercurynews.com/2014/12/03/peers-unveils-products-for-workers-in-the-sharing-economy/ [https://perma.cc/L9P6-M85V].

116. Tarun Wadhwa, *The Sharing Economy Fights Back Against Regulators*, Forbes (Sept. 16, 2013), http://www.forbes.com/sites/tarunwadhwa/2013/09/16/the-sharing-economy-fights-back-against-regulators-with-an-advocacy-group/#523854a13dc4 [https://perma.cc/2TR8-NWHG].

117. *See, e.g.*, Noam Scheiber, *Uber Drivers and Others in the Gig Economy Take a Stand*, N.Y. Times (Feb. 2, 2016), http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html [https://perma.cc/3EFV-GV3H] (discussing such efforts in the Dallas area for Uber drivers); Jennifer Van Grove, *Honeymoon over for on-demand apps, contract workers*, The San Diego Union Tribune (Mar 3, 2016 8:00 AM), http://www.sandiegouniontribune.com/business/technology/sdut-gig-economy-workers-political-legal-implications-2016mar03-htmlstory.html [https://perma.cc/3E4C-4PQQ] (discussing a group of Uber drivers fighting back in San Diego); Jennifer Van Grove, *Uber drivers to protest cheaper fares*, The San Diego Union Tribune (Jan. 14, 2016 3:11 PM), http://www.sandiegouniontribune.com/business/technology/sdut-uber-drivers-protest-fares-

The future of employment and labor law depends on policymakers responding to the ongoing changes in the job market, technology advances, and shifting economic realities. The paths for reform are multiple and must consist of clarifying existing definitions about worker protection, drawing on technological capacities to aid compliance and enforcement of these protections, expanding certain basic protections to all laborers regardless of their employment status, creating new protections in response to new business models, and finally, delinking fundamental social welfare programs from employment.

san-diego-2016jan14-story.html [https://perma.cc/BW7N-7QUX] (detailing the same San Diego group of Uber drivers protest of after-holiday price cuts).

The Elusive Goal of a Decent Home and a Suitable Living Environment: Confronting Today's Housing Challenges

By ALAN MALLACH*

Introduction

DECENT HOUSING IS A FUNDAMENTAL HUMAN NEED, and how to address that need is an issue that has bedeviled not only the United States, but also every developed nation, for the past hundred years or more.[1] In the United States, while there had been limited federal engagement with housing policy during the early part of the 20th century, it was during the New Deal era that the federal government clearly placed its stamp on American housing issues; with the creation of the Federal Housing Administration, the public housing

* Senior Fellow, Center for Community Progress, Washington DC; Visiting Professor, City and Regional Planning Program, Pratt Institute, Brooklyn, NY. amallach@communityprogress.net

1. The history of efforts to address housing problems, both from the standpoint of ensuring minimum healthy and safety standards in housing and with respect to producing affordable housing for working class or lower income households, is long and complex. Extensive efforts in both respects became widespread in many countries during the second half of the 19th century, although one can trace the history of affordable housing efforts back to the almshouses of 10th century Britain. The 1890 Housing for the Working Classes Act in Britain was the first of a series of laws in that country to provide for construction of affordable dwellings. *See, e.g.*, CHARLES E. ALLAN & FRANCIS J. ALLAN, THE HOUSING OF THE WORKING CLASSES ACTS, 1890-1909 AND THE HOUSING ACTS, 1914 ANNOTATED AND EXPLAINED (Butterworth & Co., 4th ed. 1916). Social housing policy in France dates from the same era; *see* DANIÈLE VOLDMAN, DÉSIRS DE TOITS. LE LOGEMENT ENTRE DÉSIR ET CONTRAINTE DEPUIS LA FIN DU XIXE SIÈCLE (trans. "Seeking Shelter: housing between aspirations and constraints since the late 19th century), Paris: (Créaphis Éds. 2010). Tenement house reform was a major public issue in the United States, particularly in New York City and New York State, during the second half of the 19th century; *see* JAMES FORD, ET. AL., SLUMS AND HOUSING, WITH SPECIAL REFERENCE TO NEW YORK CITY; HISTORY, CONDITIONS, POLICY. (Cambridge MA: Harvard University Press, 1936); *see also* GWENDOLYN WRIGHT, BUILDING THE DREAM: A SOCIAL HISTORY OF HOUSING IN AMERICA (Cambridge, MA: MIT Press 1981).

program, and more.[2] Finally, in the Housing Act of 1949, Congress set forth the goal that every American family should have a "decent home and a suitable living environment."[3] While that enactment included authorization for the urban renewal program, which arguably did more to hinder than further that objective, can be seen as a painful irony,[4] it remains that that goal has been the foundation for housing policy in the United States ever since 1949.[5] As a nation, the United States has made progress toward improving housing conditions in many different respects since then, but as it has done so, new challenges have emerged. The purpose of this paper is to outline some of the most critical of those challenges and explore how they can be addressed, and in the process try to bring the 1949 pledge closer to reality.

Today's housing crises are fundamentally economic in nature, as I will discuss below. They are affected and distorted by legal inequities and the failure of the political system to address them responsibly or effectively, but they remain fundamentally economic. As such, housing cannot be separated from the larger economic challenges facing our nation, in particular the dearth of well-paying jobs, the growth in economic inequality, and the economic marginalization of a growing share of America's families and individuals.

Housing is not only inextricably intertwined with the economic condition of households and the ways in which the economy distributes wealth and earnings, but also with its larger physical environment, for which the term 'neighborhood' forms a useful shorthand;[6]

2. *See, e.g.*, Alexander von Hoffman, *History Lessons for Today's Housing Policy: The Political Processes of Making Low-Income Housing Policy*, 1–2 (Joint Ctr. for Hous. Studies of Harv. Univ., Working Paper No. WI2-5, 2012), *available at* http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/w12-5_von_hoffman.pdf [https://perma.cc/HJ3S-GXD9]; Alexander von Hoffman, *High Ambitions: The Past and Future of American Low-Income Housing Policy*, 7 Housing Policy Debate 423, 424–430 (1996), *available at* https://www.innovations.harvard.edu/sites/default/files/hpd_0703_hoffman.pdf [https://perma.cc/SZP2-A6Y3]; J.A. Stoloff, *A Brief History of Public Housing*, U.S. Dep't of Housing and Urb. Devel., *available at* http://reengageinc.org/research/brief_history_public_housing.pdf.

3. 42 U.S.C. §1441 (1949).

4. *See, e.g.*, Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 Housing Policy Debate 443, 445–51 (2000); Martin Anderson, The Federal Bulldozer: A Critical Analysis of Urban Renewal 1949-1962, (Cambridge: MIT Press 1964).

5. This connection (or dis-connection) is explicitly addressed in Charles J. Orlebeke, *The Evolution of Low-Income Housing Policy, 1949 to 1999*, 11 Housing Policy Debate 489, 490–92 (2000).

6. The term neighborhood is used in a variety of different ways to mean a variety of different things, with some definitions referring to a physical space, and others to a geographic area that also contains certain social or economic relationships; *See, e.g.*, Robert E. Park, Ernest W. Burgess & Roderick D. McKenzie, The City 7–9 (University of Chicago

specifically, the "suitable living environment" that was coupled with the "decent home" by the framers of the 1949 Housing Act.[7] For all of our increasingly wired existence, neighborhoods still matter deeply, particularly for the lower income households who lack the mobility and digital links of the more affluent. To provide sound, affordable housing units in the midst of dangerous, declining neighborhoods without changing the trajectory of those neighborhoods can, not unreasonably, be characterized as winning a battle, but perhaps losing the war.

Finally, these challenges are not the same across the United States. The United States is a large country with hundreds, if not thousands, of distinct housing markets. Although providing affordable housing to members of the middle class may be a critically important challenge in San Francisco,[8] it is a far less pressing issue in all but a handful of cities throughout the rest of the United States. In the great majority of the nation's metropolitan areas, a family with an income that places them at the metropolitan area median[9] has no difficulty finding acceptable and affordable housing in decent neighborhoods.[10] The heart of the housing crisis, when looking at the United States as a whole, is very different. In the coming pages, I will outline three of the most critical housing challenges facing the United States today and suggest how they might be addressed. While there are other housing challenges that people in the United States face,

Press 1925); *compare with* D. Warren, Helping Networks (South Bend, IN: Notre Dame University Press,1981) (referring to a neighborhood as "a social organization of a population residing in a geographically proximate locale"). One scholar concluded that "[u]rban social scientists have treated 'neighborhood' in much the same way as courts of law have treated pornography: as a term that is hard to define precisely, but everyone knows it when they see it." George Galster, *On the Nature of Neighborhood*, 38 Urb. Studies 2111, 2111 (2001).

7. 42 U.S.C. § 1441 (2010).

8. The title of the symposium that took place in January 2016 at the University of San Francisco School of Law, where this paper was presented in preliminary form, was *Housing for Vulnerable Populations and the Middle Class: Revisiting Housing Rights and Policies in a Time of Expanding Crisis.*

9. Office of Policy Dev. and Research, U.S. Dept. of Housing and Urban Dev., https://www.huduser.gov/portal/datasets/il.html [https://perma.cc/5KWV-R8S2] (last visited July 27, 2016).

10. *See* Svenja Gudell, *November Market Report: How Much Would it Cost to Buy Every Home in America?*, Zillow, http://www.zillow.com/research/total-housing-value-2015-11535/ [https://perma.cc/Y6JR-NSLE] (Dec. 20, 2015). An analysis of data from Zillow.com on sales prices and rental levels by metropolitan area and city for November 2015 found that San Francisco was the most expensive large jurisdiction in the United States. The median asking rent for a 2-bedroom unit in San Francisco was $4700/month, 3.4 times the national median of $1382/month.

these three are critical ones that also affect many other issues, including homelessness, not discussed directly in this paper.[11]

I. Three Critical Challenges

A. The Persistent Housing Crisis of America's Poor

The most significant housing crisis facing the United States today is the daily crisis faced by the great majority of poor or near-poor renters in terms of what it means to be able to meet basic necessities of a decent life, as well as its significance in terms of human dignity and opportunity. For families with incomes below the poverty level, there is little or no housing at any level of quality that they can afford without subsidies.[12] Yet, the overwhelming majority of these families have no access to housing subsidies or other assistance.[13] As a result, they live in a state of deprivation[14] and persistent housing crisis; their low incomes, coupled with the unpredictability and insecurity of those incomes, condemn them to revolving door existences in substandard housing, distressed and dangerous neighborhoods, forced moves, evictions, doubling up, and homelessness, as powerfully documented in Harvard sociologist Matthew Desmond's work.[15] While the number

11. I do not discuss homelessness in this paper; I would argue, however, that the first crisis that I address, that of the plight of low-income renters, is arguably the most important trigger for family homelessness, which would be significant diminished if the rental–housing gap were addressed. *See, e.g.*, *Homeless Families with Children, National Coalition for the Homeless Fact Sheet #12*, NATIONAL COALITION FOR THE HOMELESS (Aug. 2007), http://www.nationalhomeless.org/publications/facts/families.html [https://perma.cc/8Q5P-2FG6] (noting that "[p]overty and the lack of affordable housing are the principal causes of family homelessness").

12. According to the 2014 American Community Survey, 87% of all renters earning $20,000 or less and 75% of all renters earning $20,000-$34,999, for whom housing costs were computed, were spending 30% or more of their income for rent. *Household Income by Gross Rent as a Percentage of Household Income in the Past 12 Months*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_C25074&prodType=table (last visited Sept. 29, 2016) [https://perma.cc/7TDJ-6S2U].

13. According to the US Department of Housing & Urban Development, 26% of very low income families qualified to receive housing assistance actually receive assistance; *see, e.g.*, *The State of the Nation's Housing 2015*, Joint Center for Housing Studies of Harv. U. 33 (2015), http://www.jchs.harvard.edu/research/state_nations_housing [https://perma.cc/2Y5N-5M7F]. It is difficult to evaluate this figure, but the author believes that it does not reflect the extent to which many such families technically receiving assistance actually remain cost-burdened, as discussed below; *see infra* text accompanying note 61.

14. *See The State of the Nation's Housing 2015*, *supra* note 13, at 31 ("[S]everely cost-burdened households in the bottom expenditure quartile spent 70 percent less on healthcare and 40 percent less on food than their counterparts with housing they could afford.").

15. *See* in particular MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY, (Crown Publishers, 1st ed. 2016); Matthew Desmond, *Eviction and the Reproduction*

of American families and individuals in this situation is difficult to measure precisely due to the wide variations in market conditions from one area to the next, it can conservatively be estimated at thirteen to fifteen million households, or 12% to 14% of all American households, and one out of three renter households.[16] Table 1 shows the extent to which cost burden affects low-income households in the nation's five most populous metropolitan areas. While it shows that the severity of the cost burden varies by area for renter households who might be characterized as 'near-poor,' those earning between $20,000 and $35,000 per year, reflecting the extent to which relatively moderate-priced housing is more readily available in areas like Houston or Chicago than in New York or Los Angeles, poor families are overwhelmingly likely to be severely cost-burdened in all areas.

Table 1: Percentage of Cost Burdened and Severely Cost Burdened Renter Households by Income Range and Metropolitan Area

Category	% of gross income spent on rent	New York	Los Angeles	Chicago	Houston	Philadelphia
Households earning under $20,000	50% or more	71%	77%	82%	77%	76%
	30% to 49.9%	16%	14%	11%	19%	13%
	Less than 30%	13%	9%	7%	5%	11%
Households earning $20,000 to $34,999	50% or more	51%	53%	31%	19%	31%
	30% to 49.9%	33%	29%	54%	57%	50%
	Less than 30%	16%	8%	16%	24%	19%

Note: Some percentages may exceed 100% due to rounding.
Source: 5 Year 2010-2014 American Community Survey Table B25074. Analysis by author.

of Urban Poverty, 118 Am. J. of Sociology 88, 88 (2012) (exploring "the prevalence and ramifications of eviction in the lives of the urban poor").

16. Estimate by author.

Desmond makes clear that the crisis he delineates is not the work of heroes and villains, suffering tenants and evil landlords, or vice versa. The landlords he profiles are not demons, and his tenants are not saints. They are all basically normal, flawed human beings. They are victims of a systemic condition caused by two fundamental realities that are not going to be remedied by legal measures. First, the economics of what poor people live on—either from public assistance or low-wage jobs—are inadequate to afford what it costs to create or provide even modest housing of decent quality.[17] Second, by severely limiting the number of subsidized housing units or Housing Choice Vouchers[18] made available, our political system has failed to address this issue in a meaningful fashion. In place of a reliable social safety net, affordable housing for the poor in the United States takes the form of a lottery, where a lucky few poor families get housing vouchers and the rest are largely left out in the cold.

B. The Erosion of the Urban Neighborhood

The second challenge facing the United States is the widespread erosion of quality of life and housing market conditions, in both housing quality and value, in America's urban neighborhoods, including

17. This is a critical point. In order to remain in business, a landlord must charge enough to cover (1) the cost of maintenance, management, repairs, insurance, reserves and other operational requirements of the housing; (2) the cost of taxes and fees charged by governmental bodies; (3) mortgage or other loan payments, if any; (4) an allowance for vacancy and uncollectable rents; and (5) a minimally acceptable return on equity. Based on the author's experience, the cost profile, for a modest single family urban house for which we assume the landlord paid $50,000 in cash (which is typical of landlords in low-end markets) is as shown in the table below. In order for a family to afford the lowest plausible rent of $625/month without cost burden requires an income of $25,000, roughly 25% higher than the gross income of a three-person family at the top of the poverty level.

Category	Monthly Cost
Maintenance & operations	$200-$300
Property taxes	$100-$150
Vacancy & collection allowance	$75-$100
Return on equity (6%-8%)	$250-333
TOTAL	$625-$883

18. Housing Choice Vouchers, also known as Section 8 Vouchers, provide a subsidy that makes up the difference between the market rent for a house or apartment and 30% of the gross income of a very low-income family. *See Housing Choice Vouchers Fact Sheet*, U.S. DEP'T. OF HOUSING AND URB. DEV. (July 28, 2016), http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/about/fact_sheet [https://perma.cc/8YQU-SDG9].

inner-ring suburban communities in many parts of the country.[19] Gentrification may be the dominant form of neighborhood change in San Francisco—and in a handful of other cities around the country like Washington, D.C. or New York City—but these cities are the exception to the rule. Looking at America's older cities as a whole, more neighborhoods are declining than rebounding, and in a host of metros like Cleveland, St. Louis, and Chicago, the decline has spread to many of those cities' suburbs, particularly the ones where thousands of modest homes and garden apartments were constructed in the 1950s and 1960s.[20] These communities have seen dramatic transformations over the past decade.[21]

The significance of this decline reflects the reality that housing is not only about housing units, but also about the communities in which they are situated. People do not just live in housing units; they live in communities. When economic decline begins to unravel the fabric of a community, it triggers a series of consequences with devastating effects for those who live there. As stores close and neighborhood shopping districts deteriorate, commercial activity declines, public services deteriorate, the quality of public education declines, and crime and visible disorder, both physical and social, increase. As housing maintenance and values decline, vacant abandoned houses start to appear on once-stable blocks. Investors, who are often speculators, then buy homes that are left by their owners or lost to foreclo-

19. *See* Alan Mallach, *What Drives Neighborhood Trajectories In Legacy Cities?, Understanding The Dynamics Of Change*, (Lincoln Inst. of Land Policy, working paper No. WP15AM1, 2015); Allan Mallach, *Gentrification and Neighborhood Decline in a Legacy City: Looking at Milwaukee 2000-2012* (Nov. 2015), *available at* http://www.communityprogress.net/filebin/Milwaukee_Gentrification_and_Neighborhood_Change_11_10_15.pdf [https://perma.cc/RGX7-UDHF]; "Is the Urban Middle Neighborhood an Endangered Species? Multiple Challenges and Difficult Answers" in Paul Brophy, Ed., *On the Edge: America's Middle Neighborhoods*. New York: American Assembly (2016). Also appeared in *Community Development Investment Review*, Vol.11, no. 1 (2016) (all sources providing a detailed discussion of this issue); *see, e.g.*, John Rennie Short, Bernadette Hanlon, & Thomas J. Vicino, *The Decline of Inner Suburbs: The New Suburban Gothic in the United States*, 1 Geography Compass 641–656 (2007); Bernadette Hanlon, *The Decline of Older, Inner Suburbs in Metropolitan America*, 19 Housing Policy Debate 423 (2008) (discussing the decline of inner suburban communities).

20. For suburban development in the 1950s and 1960s, *see, e.g.*, Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States, 190–218 (Oxford Univ. Press 1985); and Dolores Hayden, Building Suburbia: Green Fields and Urban Growth, 1820-2000 128–53 (2003). For the decline of these suburbs, *see supra* note 19 and *infra* note 21.

21. *See* Elizabeth Kneebone & Alan Berube, Confronting Suburban Poverty in America (Brookings Institution Press 2013).

sure. Remaining lower-income homeowners, whose modest wealth is tied up in their homes, then see their equity disappear.

Neighborhood decline, of course, has been a well-established phenomenon in the nation's older cities since the end of World War II, if not earlier.[22] The cumulative effect of disinvestment, white flight, regional population shifts, and de-industrialization led to a profound crisis of the cities that reached its apex from the 1960s through the 1980s, triggering massive population and job losses, and the decline or abandonment of hundreds of urban neighborhoods.[23] This is a central reality of modern American history.

The collapse of urban neighborhoods at that time was part and parcel of a larger urban decline reflected in the all but universal "urban crisis" trope. Things are different today. Cities are, as they say, coming back. A revival, massive in scale and intensity, is taking place in American cities.[24] While the transformation is greatest in cities like San Francisco and Washington, D.C., it is also present on a smaller scale in Buffalo, St. Louis, and a host of other cities that were all but given up for dead a few decades ago. The number of jobs in older cities is increasing, as Table 2 shows for three highly publicized 'magnet' cities and three older industrial cities, often at rates significantly greater than national growth during the same period. Well-educated people in their twenties and thirties, the so-called "millennial generation", are moving to cities in unprecedented numbers.[25] In many cities, decades of population decline

22. *See* ROBERT A. BEAUREGARD, VOICES OF DECLINE: THE POSTWAR FATE OF AMERICAN CITIES (1993).

23. The dimensions of the postwar urban crisis in the United States have spawned a vast literature. *See id.*; *see for example* ROBERT A. BEAUREGARD, WHEN AMERICA BECAME SUBURBAN (U. of Minn. Press 2006); DOUGLAS W. RAE, CITY: URBANISM AND ITS END (Yale Univ. Press 2003); and KATHARINE L. BRADBURY, ANTHONY DOWNS, & KENNETH A. SMALL, URBAN DECLINE AND THE FUTURE OF AMERICAN CITIES (The Brookings Institute, 1982).

24. There is an extensive body of recent literature, much of it overstated, about the current revival. *See e.g.*, PAUL S. GROGAN & TONY PROSCIO, COMEBACK CITIES: A BLUEPRINT FOR URBAN NEIGHBORHOOD REVIVAL (Westview Press 2000); *see also* CHRISTOPER LEINBERGER, THE OPTION OF URBANISM: INVESTING IN A NEW AMERICAN DREAM (Island Press 2008); *see* Zachary Karabell, *The Golden Age of American Cities – and What's Really Behind It*, THE ATLANTIC (Oct. 25, 2013); Edward Luce, *The Future of American City*, FINANCIAL TIMES (June 7, 2013).

25. *See* Joe Cortright, *The Young and Restless and the Nation's Cities*, CITYOBSERVATORY (2014); Alan Mallach, *Who's Moving to the Cities, and Who Isn't*, CENTER FOR COMMUNITY PROGRESS (Sept. 2014).

Table 2: Job Growth 2002-2013 in Selected Cities

City	Jobs in 2002	Jobs in 2013	% Increase
Austin	486,726	570,046	17.1%
San Francisco	476,807	584,008	22.5%
Seattle	440,935	469,566	6.5%
Baltimore	298,539	311,544	4.3%
Philadelphia	571,150	608,149	6.5%
Pittsburgh	245,284	269,953	10.1%
United States	130,599,000	136,438,000	4.5%

Source: National data, Bureau of Labor Statistics, Current Employment Statistics, June of each year: city data, U.S. Bureau of the Census Longitudinal Employer-Household Dynamics, http://onthemap.ces.census.gov/index.html.

have slowed or even reversed. Yet, urban neighborhoods—including many that somehow survived those earlier decades—are declining at a rate that may even be greater than during those earlier years. And in most cities, those neighborhoods tend to be disproportionately African-American.[26]

The decline of so many urban neighborhoods at a time where other parts of the same cities are not only growing in population, but seeing unprecedented levels of property value appreciation and investment, heralds both the deterioration of the quality of life in much of the city and a pattern in which cities like Cleveland, St. Louis, or Baltimore are becoming increasingly polarized. This polarization is not only between rich and poor, but also between a favored few neighborhoods where markets are vital and to which people actively want to move, and a much larger number where the opposite is true. This polarization, which Mayor DeBlasio of New York highlighted in his "tale of two cities" 2013 mayoral campaign,[27] has emerged as an issue of growing importance in the national urban political discourse.

26. *See supra* note 19.

27. *See, e.g.*, Hunter Walker, Bill de Blasio Tells "A Tale of Two Cities" at His Mayoral Campaign Kickoff, Observer (Jan. 27, 2013 4:34pm), http://observer.com/2013/01/bill-de-blasio-tells-a-tale-of-two-cities-at-his-mayoral-campaign-kickoff/ [https://perma.cc/DK5B-A5HQ].

Many strands contribute to the decline of the urban neighborhood. They include demographic changes, which have led to drastic declines in the number of child-rearing married couples overall, and, particularly in urban areas, the type of household for whom these neighborhoods were initially designed;[28] and economic changes, which have stripped cities of the well-paying manufacturing and other blue collar jobs that once sustained working-class neighborhoods. Another factor includes the aging of the urban housing stock, most of which was built over 60, and often over 100, years ago. The decline in homeownership, discussed below, and the constant turnover of the renter population, has been exacerbated by the economic crisis faced by low-income renters, as discussed above. Urban areas continue to face competition from the suburbs, including a significant (and possibly accelerating) recent out-migration of African-American middle class households.[29] Finally, underlying these trends are two national factors that powerfully affect them: First, the decline in the middle-class population share in the United States as a whole, referred to as the "hollowing of the middle class," and, second, the simultaneous increase in economic segregation or 'sorting' of the population, which has led to more poor neighborhoods and more affluent ones, but increasingly fewer in the middle.[30]

28. As an illustration, in 1960, child-rearing married-couple households made up 44% of all households in Dayton, Ohio, and 45% in Youngstown, compared to 43% in Ohio as a whole. Today, they make up 20% of all Ohio households, but barely 8% of the households in these two cities; *see* Mallach, *supra* note 19.

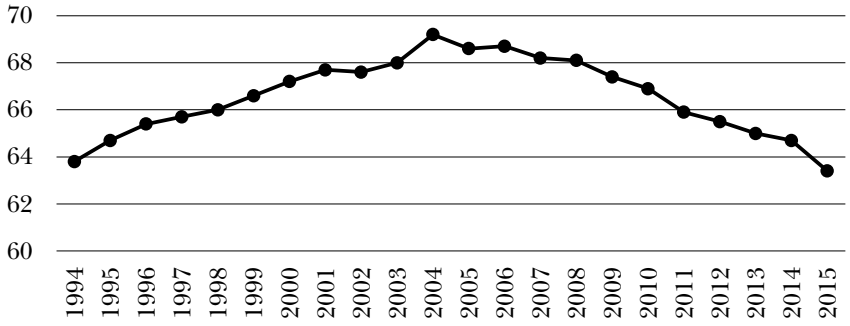
29. There has been little systematic analysis of this phenomenon, *but see* Mallach (*Dynamics of Change*), *supra* note 19, for an overview of this issue. It has been the subject of a growing number of journalistic accounts. *See, e.g.*, Mike Mallowe, *Black Exodus: Part Two*, METROPOLIS (Oct. 6, 2011), http://www.phlmetropolis.com/2011/10/black-exodus-part-two.php [https://perma.cc/R65Y-HH5Y] (examining "African-American mass movement" from urban to suburban Philadelphia); *see also* Alex P. Kellogg, *Black Flight Hits Detroit*, WALL STREET JOURNAL (June 5, 2010), http://www.wsj.com/articles/SB10001424052748704292004575230532248715858 [https://perma.cc/WWA8-J3JF] (examining "black flight" from Detroit).

30. For hollowing of the middle class, *see* Derek Thompson, *The Hollowing Out of the Middle Class*, Atlantic (Sept. 1, 2010), http://www.theatlantic.com/business/archive/2010/09/the-hollowing-out-of-americas-middle-class/62330/ [https://perma.cc/HD7P-FUPY]; *see generally The American Middle Class is Losing Ground*, PEW RESEARCH CTR. (Dec. 9, 2015), http://www.pewsocialtrends.org/2015/12/09/the-american-middle-class-is-losing-ground/ [https://perma.cc/X4R9-V2NU]; *see generally* KENDRA BISCHOFF & SEAN F. REARDON, RESIDENTIAL SEGREGATION BY INCOME, 1970-2009 (Brown Univ. ed., 2013) (exploring economic sorting); SEAN F. REARDON & KENDRA BISCHOFF, GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME (Brown Univ. ed., 2011); *see also* JASON C. BOOZA, JACQUELINE CUTSINGER, & GEORGE GALSTER, WHERE DID THEY GO? THE DECLINE OF MIDDLE-INCOME NEIGHBORHOODS IN METROPOLITAN AMERICA (The Brookings Inst. ed., 2006).

C. The Erosion of Homeownership

The third housing challenge facing the United States is the precipitous drop in homeownership that has taken place since the end of the housing bubble. Homeownership rates have been steadily declining since 2004, as shown in Figure 1; while it was reasonable to assume that they would drop during the crisis years of recession and mass foreclosures, as Figure 1 shows, they have continued to decline even since the end of the recession, falling back to the levels of the early 1990s.[31]

Figure 1: National Homeownership Rates 1994 to 2015



The crux of the problem does not lie in any fundamental change in the desire of Americans to become homeowners, or the decisions by some affluent millennials to put off buying homes for a few years as some have suggested,[32] or an affordability problem, but, rather, it reflects the inability of millions of potential homeowners to gain access to homeownership as a result of the long-term effects of the mortgage crisis in terms of credit availability coupled with massive *de facto* redlining of urban neighborhoods and lower-income and minority

31. Strictly speaking, the national homeownership rate for the first quarter of 2015 was the lowest since 1967. This is somewhat misleading, however, since homeownership rates remained largely unchanged from the 1960s through the mid-1990s; *see generally*, Figure 1, *infra*, p. 489, source: CENSUS BUREAU, HOUSING VACANCY AND HOMEOWNERSHIP SURVEY (Apr. 2016), https://www.census.gov/econ/currentdata/dbsearch?program=HV&startYear=1994&endYear=2015&categories=RATE&dataType=HOR&geoLevel=US&notAdjusted=1&submit=GET+DATA&releaseScheduleId [https://perma.cc/5XE8-4G63].

32. *See Why Millennials Are Delaying Home Buying More Than Ever*, KNOWLEDGE@WHARTON (Nov. 18, 2015), http://knowledge.wharton.upenn.edu/article/why-millennials-are-delaying-home-buying-more-than-ever/ [https://perma.cc/7MCV-LJYX]; *see generally* Eric S. Belsky, *The Dream Lives On: The Future of Homeownership in America*, Joint Ctr. for Hous. Studies of Harvard Univ. (2013) (discussing American attitudes toward homeownership since the end of the housing bubble and the extent to which the dream of homeownership remains intact).

homebuyers. Although there has been a tendency in some circles to suggest that this is not a problem,[33] and that, in the words of a colleague, "we should get over homeownership," I would argue that that is not a tenable position. The collapse of homeownership is indeed a problem, and a serious one.

Arguably, no subject in housing has been researched as thoroughly as homeownership and its effects. While the quality of the research and the extent to which it controls for extraneous variables is uneven, much of it, particularly since 2000, is methodologically rigorous and substantively compelling.[34] The research paints a consistent and powerful picture. Homeownership is powerfully associated with many of the factors that are linked to social and economic wellbeing, both of families and of their communities. The literature has established positive associations between homeownership and psychological and physical health, child outcomes, community engagement, and social capital.[35] Moreover, despite the experience of the recent market collapse, the evidence is strong that, over the long haul, homeownership more often than not builds.[36] Indeed, it may be the only path available today for a working class family to do so.[37] Try as we may, given our culture and history, a model of rental tenure in this country that can replicate these effects is unlikely.

33. *See* Ryan Cooper, *It's time to kill the American Dream of homeownership*, THIS WEEK (Apr. 25, 2014), http://theweek.com/articles/447561/time-kill-american-dream-homeownership [https://perma.cc/CRY3-DD8J].

34. Homeownership is related to many other factors referred to by economists as covariates, such as income, wealth, time in residence, and neighborhood characteristics, dictating that these factors must be controlled for in order to isolate the effect of homeownership. Another concern is that of self-selection. *See, e.g.*, William M. Rohe & Mark Lindblad, *Reexamining the Social Benefits of Homeownership after the Housing Crisis* (Joint Ctr. for Hous. Studies of Harvard Univ. 2013).

35. *See, e.g.*, Rohe & Lindblad, *supra* note 34; *see also*, William M. Rohe & Leslie S. Stewart, *Homeownership and Neighborhood Stability*, HOUSING POLICY DEBATE, vol. 7 issue 1, 37–81 (Fannie Mae Foundation 1996); *see, e.g.*, William M. Rohe, Shannon Van Zandt, & George McCarthy, *The Social Benefits and Costs of Homeownership: A Critical Assessment of the Research* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV. (2011). For a summary of research findings, *see also* Mallach, *supra* note 19.

36. *See generally* Alan Mallach, *Building Sustainable Ownership: Rethinking Public Policy toward Lower-Income Homeownership* DISCUSSION PAPERS (2011) (analyzing three contrasting market areas (Boston, Chicago and Las Vegas) for the period from 1987 to 2010, looking at all possible buy-sell month-by-month timing options during that period. The paper found that the probability of a homeowner realizing a 3% or greater annual return in current dollars on sale ranged from 65% in Las Vegas to 79% in Chicago, even factoring the period from 2006 to 2010, when property values were generally declining).

37. Mallach, *supra* note 36. *See also*, Mark Duda &,Eric S. Belsky, *Asset Appreciation, Timing of Purchases and Sales, and Returns to Low-Income Homeownership* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV. (2002).

In contrast to the first two issues, there is no fundamental economic reason underlying the sharp decline in homeownership. In many—perhaps most—cities around the United States, given the mortgage interest rates that have been generally available in recent years, it has been and continues to be substantially less expensive to buy than to rent comparable housing. Table 3 compares the monthly cost to carry the median priced single family house with the median two-bedroom rental at the end of 2015, for three cities with relatively, but not extremely, low house prices. Moreover, reflecting the continued desire of large numbers of people of all racial and economic backgrounds to become homeowners, demand—although it may well have declined in the immediate aftermath of the bursting of the housing bubble—has rebounded strongly.[38]

Table 3: Monthly Cost to Rent and Own in Three Cities

	Memphis TN	Rochester NY	Tulsa OK
Median sales price	$63,800	$63,900	$106,800
Annual mortgage amount with 20% down	$51,040	$51,120	$ 85,440
Annual payment on 30-year mortgage at 4%	$ 2,924	$ 2,929	$4,895
Annual property taxes[39]	$ 513	$ 675	$1,097
Insurance	$ 800	$ 800	$ 800
TOTAL ANNUAL COST	$ 4,237	$ 4,404	$6,792
Monthly cost to own	$ 353	$ 367	$ 566
Monthly rent for median 2 bedroom unit	$ 725	$ 850	$ 900
Owner cost as % of renter cost	49%	43%	63%

Source: data on median sales prices, insurance and rents from Zillow.com; calculations by author.

38. *See* Belsky, *supra* note 32; Rohe & Lindblad, *supra* note 35. Anecdotal information from many local governments and non-profit developers building or rehabilitating housing in urban neighborhoods with support from the federal Neighborhood Stabilization Program strongly indicates that homebuyer demand for these houses was strong, but was derailed for the reasons discussed in the text below.

39. Property taxes were estimated by averaging actual property taxes on three properties in each area listed on Zillow.com at the median price +/- 10% and adjusting to the relative price of the median property.

The evidence is compelling that the reasons for the decline in homeownership primarily result from the manner in which lending practices have changed over the past decade, changes that reflect policy shifts in both the private and public sectors. These changes have resulted in the severe rationing of mortgage credit to a disproportionately large share of American households and the growth of appraisal practices that work against the extension of credit to struggling urban neighborhoods.[40]

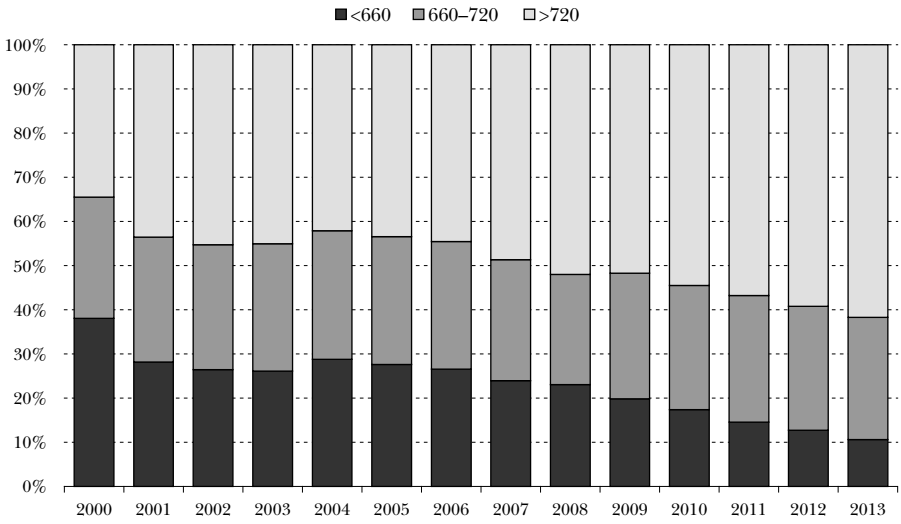
Mortgage lending decisions in recent years have come to be dominated by the would-be borrower's credit score; a number that represents the synthesis of a body of financial data about the borrower and is designed to measure the credit risk that he or she represents.[41] As shown in Figure 2, the distribution of mortgage loans by borrower credit score has changed dramatically since the mortgage crisis that erupted in 2006 and 2007. As the figure shows, the share of mortgages going to households with credit scores of 660 or below, representing 37% of all households in 2012,[42] dropped from roughly 37% in 2000—or roughly their proportionate share of the potential homebuying population—to under 10% by 2013. While 2000 may have been an anomaly, the figure shows that households in this category received approximately 25% of all mortgage originations between 2001 and 2006.

40. The issue of appraisal practices, and their deleterious effect on real estate transactions, particularly home buying in lower-income communities, is a complex one, and will not be addressed here in detail. While there has been little scholarly research on this subject, *but see* Leonard Nakamura, *How Much is that Home Really Worth? Appraisal Bias and House-Price Uncertainty*, Bus. Rev. 11 (2010); *see, e.g.*, Jeff Green, *Detroit Homes Rot as Appraisals Stopping Sales, Mortgages*, Bloomberg Business (April 9, 2013, 5:30 AM PDT), *available at* http://www.bloomberg.com/news/articles/2013-04-09/detroit-homes-rot-as-appraisals-stopping-sales-mortgages [https://perma.cc/X5B9-YEUA].

41. *See, e.g.*, Robert B. Avery, Raphael W. Bostic, Paul S. Calem, & Glenn B. Canner, *Credit Risk, Credit Scoring and the Performance of Home Mortgages*, Fed. Res. Bull. 621 (1996).

42. Scott Zoldi, Andrew Jennings, & Brian Kinch, *FICO Score Distribution Remains Mixed*, FICO Blog, http://www.fico.com/en/blogs/risk-compliance/fico-score-distribution-remains-mixed/ (last visited July 26, 2016) [https://perma.cc/7XMJ-Z2K6].

Figure 2: Mortgage Originations by Credit Score 2000-2013



Source: Urban Institute/CoreLogic Housing Finance Policy Center.[43]

While nearly two out of five American households have credit scores under 660, they account for fewer than 10% of the mortgages originated in the past five years.[44] However, this drastically underestimates the mortgage shortfall for lower-income, young, and minority households. Younger households and minority households are disproportionately likely to have low credit scores, putting them at a particular disadvantage. Table 4 shows the percentage of households in the lowest four credit score deciles[45] by age and by ethnicity.

Although hard to pin down with precision, when age is overlaid with income and race, it is clear that the number of moderate or middle income Black or Latino families headed by someone in his or her forties or younger, who is able to get a mortgage to purchase a home

43. Laurie Goodman, Jun Zhu, & Taz George, *The Impact of Tight Credit Standards on 2009–13 Lending*, URB. INST. (Apr. 2, 2015), *available at* http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000165-The-Impact-of-Tight-Credit-Standards-on-2009-13-Lending.pdf [https://perma.cc/2XN8-6TDY].

44. *Housing Finance at a Glance: A Monthly Chartbook*, URB. INST. (Jan. 2016), *available at* http://www.urban.org/sites/default/files/alfresco/publication-pdfs/2000588-Housing-Finance-at-a-Glance-A-Monthly-Chartbook-January-2016.pdf [https://perma.cc/5VCA-EW9C].

45. A decile represents one-tenth of the total number of cases (in this case households) in the universe being studied. The lowest four deciles are the same as the lowest 40% of cases.

today, is vanishingly small. In 2014, only 20,000 lower-income[46] Black households obtained conventional

Table 4: Percentage of Households in Lowest Four Credit Score Deciles by Age and Ethnicity

BY ETHNICITY	White	Hispanic	African-American		
% in lowest four deciles	34.9%	58.3%	69.9%		
BY AGE GROUP	<30	30-39	40-49	50-61	62+
% in lowest four deciles	60.2%	56.2%	44.9%	34.6%	18.6%

Source: *Report to the Congress on Credit Scoring and Its Effects on the Availability and Affordability of Credit*; Washington, DC: Board of Governors of the Federal Reserve System (2007).

home purchase mortgages in the United States, accounting for less than 1% of all such mortgages made in the year.[47] A study by the Urban Institute Housing Finance Policy Center concluded that "[t]ight credit standards prevented 5.2 million mortgages between 2009 and 2014,"[48] potentially accounting for at least half of the decline in homeownership shown in Figure 1.

II. Confronting the Challenges

These three challenges are daunting, but not necessarily insoluble. Indeed, given the level of resources that the United States is capable of deploying when determining that it is in our interest to do so, it should be clear that the failure lies far less in our ability to resolve these matters than in our will to do so. Before turning directly to the

46. With incomes below 80% of the median income for the metropolitan area in which they purchased the house.

47. Home Mortgage Disclosure Act National Aggregate Report, Table 5-2, (accessed June 3, 2016), *available at* https://www.ffiec.gov/hmdaadwebreport/NatAggWelcome.aspx [https://perma.cc/8X9F-BRJQ].

48. Bing Bai, Laurie Goodman, & Jun Zhu, *Tight credit standards prevented 5.2 million mortgages between 2009 and 2014*, URBAN WIRE (Jan. 28, 2016), *available at* http://www.urban.org/urban-wire/tight-credit-standards-prevented-52-million-mortgages-between-2009-and-2014 [https://perma.cc/L537-BCFL].

challenges, however, some more general observations to put the challenges and their potential remedies in perspective are in order.

First, we must recognize that the United States economy is a capitalist or market economy, and the great majority of housing options for people of all income levels will be those offered by the private market. The history of housing initiatives in this country since the 1930s makes clear that the vision of creating a distinct social housing stock,[49] that will meet more than a small fraction of the housing needs of lower-income households is a chimera. Depending on the private housing stock for our solutions does not mean that we can or should depend on the unfettered machinery of the market for those solutions. Indeed, it is patently clear, as the discussion of the challenges above shows, that in the absence of some combination of public controls and public support, the market *cannot* meet the needs of large parts of our population and our communities. The questions that must be asked are not whether, but *how* we work with the market, and what legal and economic initiatives are needed to move the market to better meet the nation's housing needs.[50]

Second, one must always bear in mind that issues regarding housing are not *just* about housing itself. How we address where people live, and the conditions under which they live, raises fundamental questions about the nature of American society. We should not, as a nation, allow conditions that perpetuate not only human misery but also allow multigenerational poverty for millions to persist. We should not allow our cities and regions to become increasingly polarized between rich and poor, as the middle steadily shrinks, and we should not allow avenues to mobility and opportunity to be increasingly blocked by limiting the housing and neighborhood choices of the nation's lower-income households. Those are the implications for American society of the persistence of the housing challenges that have been described above.

49. By social housing stock, I mean an inventory of housing that is controlled by public or private non-profit entities, limited to individuals whose incomes are certified to be below designated levels, and regulated so that it remains outside the market indefinitely.

50. This is a question that, in my experience, is far too rarely asked by practitioners in the housing and community development field, which tends to focus its attention on that small part of the housing stock that they can control. In the final analysis, however, an unwillingness to engage with the market, and to aggressively explore how creative regulation and use of resources can improve conditions for the millions of lower income families who depend on private market housing, represents a failure on the part of the entire field to grapple with the most important issues facing the people and communities who constitute their *raison d'etre*.

Further, it is important to understand where the roots of the nation's housing problems lie. The problems I have delineated are *not* fundamentally legal problems. The laws that govern the provision of housing need improving. One example is land use law where exclusionary zoning continues to be widely practiced notwithstanding the many decades since New Jersey's *Mt. Laurel* decision.[51] Other examples are landlord/tenant law and mortgage financing law. Still, these legal deficiencies do not constitute the heart of the problem. If we accept the time-honored legal principle of *ubi jus, ibi remedium,*[52] we must be clear about the nature of the remedies. The remedies must be economic, not legal. Without the economic tools to make housing rights a living, breathing reality, legal rights mean little.

The single most important policy goal that should be pursued is to fill the gap between what very low-income families can realistically afford to spend for housing and what it costs landlords to provide adequate housing. This should be done for *all* very low-income tenants, making basic housing assistance for those at the bottom of the ladder as fundamental an entitlement as are the entitlements to basic food assistance through the food stamp program[53] or to basic health care through Medicaid.[54] The paramount status of this goal is dictated by its multifaceted impact. It affects not only the lives of millions of very low-income families, but also their opportunities and the prospects for their children and grandchildren, as well as the vitality of their neighborhoods and cities.

51. *See* Southern Burlington Cnty. N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151 (1975) for an example of the first *Mt. Laurel* decision that is generally recognized as the seminal court ruling with respect to exclusionary zoning and the municipal obligation to accommodate a fair share of the regional need for low and moderate-income housing.

52. "Where there is a right, there must be a remedy."

53. The official name of the program is the Supplemental Nutrition Assistance Program or SNAP. In Fiscal Year 2016, the program was utilized by 22.4 million households, or roughly ten times the number benefiting from the Housing Choice Voucher program. *See* Supplemental Nutrition Assistance Program, U.S. DEP'T OF AGRIC. (Sept. 9, 2016) http://www.fns.usda.gov/sites/default/files/pd/34SNAPmonthly.pdf [https://perma.cc/V8XK-AMUX].

54. The Medicaid program, in conjunction with the Children's Health Insurance Program (CHIP) was benefiting nearly 71 million individuals as of November 2015. The program does not report the number of households this total represents, but it is likely to be somewhat greater than the 22 million benefiting from SNAP. *See* Medicaid & CHIP: November 2015 Monthly Applications Eligibility Determinations and Enrollment Report, DEP'T OF HEALTH AND HUMAN SERVS. (2016), *available at* https://www.medicaid.gov/medicaid-chip-program-information/program-information/downloads/november-2015-enrollment-report.pdf [https://perma.cc/2RHF-HSLQ].

A policy commitment of that magnitude demands careful consideration. At present, the Housing Choice Voucher (HCV) program provides tenant-based housing assistance to more than two million households,[55] at a cost to the federal government of approximately $21 billion, while an additional $11 billion provides project-based rental assistance for 1.2 million households.[56] Any program that would provide adequate housing for all in urgent need would most probably need to accommodate between four and six times as many households, at a substantially greater expense. The extent of that expense might vary significantly depending on the manner in which any such program was designed.

Although it might arguably be the simplest solution, it would be a mistake to simply assume that the best solution to the housing problems of very low-income tenants should be a massive increase in the number of vouchers made available. There is no question that vouchers have made lives better for millions of families; they do so at a cost per household that often appears excessive in light of evidence about the magnitude of the rent gap, while leading to significant negative effects on other low-income tenants through the effect they have in pushing up inner city rents, as landlords seek to maximize their income from voucher-holding tenants.[57] Vouchers also tend to foster concentration of low-income and minority tenants, despite efforts to

55. HUD budget documents are inconsistent about the number of households benefiting from the HCV program, with numbers varying from 2.1 to 2.4 million. While Federal FY 2016 budget materials state that the program will provide assistance to 2.4 million, the comparable FY 2017 materials state that the program (with a modest increase in funds from 2016) will assist 2.2 million households. *See* Housing Vouchers Fact Sheet, U.S. DEP'T OF HOUSING AND URBAN DEV., *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=ProposedFY17FactSheet.pdf [https://perma.cc/8K6N-PKPJ].

56. HUD FY 2016 Budget, U.S. DEP'T OF HOUSING AND URBAN DEV., *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=013015HUDOMBFinal.pdf [https://perma.cc/9T2N-294T.

57. *See* Scott Susin, *Rent vouchers and the price of low-income housing*, 83 J. PUB. ECON. 109 (2002) (making a compelling case not only that the structure of the HCV program pushes up rents in inner-city areas, but that the resulting cost increases to tenants that do *not* have vouchers substantially exceed the benefit to voucher-holding tenants. HUD proposed rule changes to the project in 2015 designed at least in part to reduce the disparity between HCV Fair Market Rents and actual rents in inner-city neighborhoods, and thus reduce the market distortions associated with the program); *see* Advanced notice of proposed rulemaking, FEDERAL REGISTER, https://www.federalregister.gov/articles/2015/06/02/2015-13430/establishing-a-more-effective-fair-market-rent-fmr-system-using-small-area-fair-market-rents-safmrs [https://perma.cc/Z6WK-LXUL]. It remains to be seen, however, to what extent an after-the-fact adjustment of this sort can reverse the effect of decades of market distortion.

use them as a vehicle to encourage mobility to areas of greater opportunity.[58]

Any strategy to house America's very low-income tenants should be one that best addresses three distinct objectives: tenant outcomes, cost-effectiveness, and neighborhood impact. The best strategy exists beyond the scope of this article, but it is important that it be systematically investigated. It may not even be a *housing* strategy. Over forty years ago, then-President Richard Nixon proposed a guaranteed annual income for every American family.[59] In the author's opinion, the Earned Income Tax Credit,[60] which benefits large numbers of low-income families, is in some respects a descendant of the Family Assistance Plan, albeit a more limited version.[61] A strong case can be made that simply putting more money into people's pockets may be a better way of enabling them to find decent housing with fewer market distortions than those created by the Housing Choice Voucher program.

As an alternative, since it is fairly clear that landlords in many markets implicitly compete for tenants with vouchers, could one create a more overt process, in which vouchers would be allocated to properties on the basis of a model in which landlords of all stripes could compete for vouchers based on the rent they offer, the location of the property, and the quality of the unit and the services provided? This is suggested merely as one of many possibilities, as it is likely that

58. Use of vouchers to foster mobility to greater opportunity areas is encouraged by the US Department of Housing & Urban Development; *see* Expanding Housing Opportunities and Mobility *in* HUD Housing Choice Voucher Program Guidebook, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_11746.pdf [https://perma.cc/KD2B-R8HT]; *see also* Mary K. Cunningham, Molly M. Scott, Chris Narducci, Sam Hall, & Alexandra Stanczyk, *Improving Neighborhood Location Outcomes in the Housing Choice Voucher Program: A Scan of Mobility Assistance Programs*, URBAN INSTITUTE (Oct. 13, 2010), http://www.urban.org/research/publication/improving-neighborhood-location-outcomes-housing-choice-voucher-program-scan-mobility-assistance-programs [https://perma.cc/J8Y9-PXWE].

59. The scheme, entitled the Family Assistance Plan, was developed by Daniel Patrick Moynihan, then an aide to President Nixon, and presented in a speech by the president on August 8, 1969. *See Richard Nixon*, THE AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/?pid=2191 (last visited Nov. 23, 2016) [https://perma.cc/L9KC-JHHP]; DANIEL PATRICK MOYNIHAN, THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN, (New York: Random House 1973) (discussing the initiative, and its unsuccessful outcome).

60. The Earned Income Tax Credit is a refundable tax credit for low-income working families adjusted on the basis of the family's earnings and number of children, initially enacted in 1975. *See Earned Income Tax Credit*, WIKIPEDIA (Sept. 16, 2016) https://en.wikipedia.org/wiki/Earned_income_tax_credit [https://perma.cc/PY9Z-A6BU].

61. *See* INTERNAL REVENUE SERVICE, https://www.irs.gov/Credits-&-Deductions/Individuals/Earned-Income-Tax-Credit (last visited Oct. 24, 2016) [https://perma.cc/D7FR-ACC6].

there are many other models also worth exploring. An intriguing alternative that could have a significant impact on the conditions of working households has been put forth recently by Peter Dreier, who has proposed to add a housing supplement to the Earned Income Tax Credit that would vary depending on the cost of housing in each local housing market.[62] Without endorsing a specific strategy, the key point is that there is a need for creative thinking about the strategy to be employed to meet this urgent need.[63]

In the context of developing a subsidy program to address their needs, low-income tenants should be provided with a basic support system, analogous to that provided, although inadequately and unevenly, to lower-income homeowners. Homeowner support systems, including both counseling and emergency assistance, have been part of the American housing scene for many years,[64] and were expanded, albeit inadequately, in the wake of the foreclosure wave that hit the United States starting in 2007. One such program was the Federal Hardest Hit Fund, which led to the allocation of $7.6 billion in federal funds for foreclosure prevention to the eighteen states with the highest housing price declines and unemployment rates.[65] While it is inaccurate to say that there are *no* similar efforts for renters, they are not only more rare, but are also far more limited both in terms of eligibility and the amount of resources available.[66]

62. *See* Peter Dreier, *How to Make Housing Affordable for All the Working Poor*, ROOFLINES (April 8, 2016), http//rooflines.org/4445/how_to_make_housing_affordable_for_all_the_working_poor/ [https://perma.cc/6P9A-U9VC].

63. In this light, it is worth noting that there has been extraordinarily little change in the models through which housing assistance is provided in the United States for the past few decades. The voucher and CDBG programs were created in 1974, the Low Income Housing Tax Credit in 1986, and the HOME program in 1990. Although they have been the subject of technical modifications over the years, the programs are essentially the same as initially designed, twenty-five or more years ago.

64. Counseling programs can be traced back at least to the 1970s, when HUD first funded a number of programs to assist homeowners at risk of default; *see Report to Congress on Housing Counseling*. Washington, DC: U.S. Department of Housing and Urban Development (1983). *See, e.g.*, Pennsylvania Housing Finance Agency, *Foreclosure Prevention*, PHFA (Jan. 2015), http://www.phfa.org/forms/brochures/foreclosure_prevention/hemap-brochure.pdf [https://perma.cc/YRU3-9X7F] (discussing one of the first programs to provide emergency financial assistance to homeowners at risk of default, Pennsylvania's Homeowner's Emergency Mortgage Assistance Program (HEMAP) established by the state in 1983).

65. The program was funded with repayments from the Troubled Asset Relief Program (TARP). *See Hardest Hit Fund*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/hhf/Pages/default.aspx (last updated Feb. 25, 2016) [https://perma.cc/LEG6-LHSK].

66. One such program is the Emergency Rental Assistance Program offered by the District of Columbia. Eligibility for this program is limited to households earning 125% of

The Low Income Housing Tax Credit ("LIHTC") program,[67] the nation's one remaining affordable housing production program, is also long overdue for critical re-evaluation. A recent study issued by HUD highlights a number of problematic features of the program.[68] Although the program requires that the units in an LIHTC project be affordable either to households earning 60% or 50%[69] of the area median income ("AMI") in the metropolitan area in which the project is located, the actual tenants of LIHTC projects typically have far lower incomes—45% earn 30% or less of AMI, and another 19% between 30.1% and 40% of AMI.[70] Once rent is made affordable at either 60% or 50% of AMI, however, in contrast to many other subsidized housing programs, it does *not* have to be adjusted to reflect the actual income of the tenant. Consequently, there is a massive gap between the actual rent and what the tenants can afford.

As a result, large numbers of LIHTC tenants receive additional housing assistance, usually in the form of vouchers.[71] Perhaps as many as one out of every three vouchers in circulation in the United States is being used to fill the rent gap for a tenant in an LIHTC project. Among those LIHTC tenants who do not receive additional assistance, roughly 2/3 are cost burdened; that is, spending over 30% of their gross income in rent.[72] For those tenants, the cost burden is likely to be an acceptable trade-off because the cost-adjusted quality of their dwelling unit is likely to be higher than what is available on the private market. Even so, it is a sad commentary on the nation's housing policies when the sole supposedly 'affordable' housing production pro-

the poverty level, a criterion that excludes thousands of families at risk because of Washington DC's extremely high market rents. *See Emergency Rental Assistance Program* [ERAP], DEP'T OF HUMAN SERVICES, GOV'T OF DISTRICT OF COLUMBIA, http://dhs.dc.gov/sites/default/files/dc/sites/dhs/service_content/attachments/DHS_FSA_ERAP_FY16_FAQs.pdf (last edited Sep. 29, 2015) [https://perma.cc/467K-S9FM].

67. 26 U.S.C. §42 (1986). Under §42 of the Internal Revenue Code, investors receive substantial credits against federal tax liability for equity investments in low-income rental housing projects, which they can then rent at lower than market levels because of the large equity share that requires no cash return. Units must rent at levels affordable to households earning 60% of the median-income established by HUD for the area in which the project is located. *See §42 Low-income housing credit*, http://www.novoco.com/low_income_housing/resources/program_summary.php (last visited Jun. 26, 2016) [https://perma.cc/8S2K-N6DL].

68. *See* MICHAEL K. HOLLAR, U.S. DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, UNDERSTANDING WHOM THE LIHTC PROGRAM SERVES: TENANTS IN LIHTC UNITS AS OF DECEMBER 31, 2012 (2015).

69. Developers must opt for one or the other affordability threshold in advance.

70. Hollar, *supra* note 68 at 24.

71. *Id.* at 29.

72. Analysis by author of data from Hollar, *supra* note 68, at 27.

gram perpetuates the same excessive cost burdens that affect the private rental sector.

The LIHTC program perpetuates another problem as well, which arises from the wide disparity in housing market conditions from one part of the United States to another. The LIHTC project may be a boon for those who need affordable housing, as well as a net benefit for the community as a whole in a city with strong demand and high rent levels, like San Francisco or Washington, D.C. However, it is a very different matter in a city where rents are more modest and demand is inadequate to absorb existing supply, particularly those cities with shrinking populations, known as legacy cities.[73] Table 5 shows LIHTC rents at 50% and 60% AMI for a two-bedroom unit, compared to the median rent for a two-bedroom unit in the private market in 2014, for five legacy cities. As the table shows, 60% AMI rents are substantially higher than the median market rent in all five cities, while 50% AMI rents are higher than the median market rent in two of the five cities. The table also shows the extent of the housing surplus in each city, reflected in the percentage of the city's housing stock that is vacant.[74]

Straightforward economic reasoning allows one to draw reasonable inferences with respect to the effect of developing LIHTC projects in cities with these characteristics. Expansion of supply in the absence of any increase in demand leads to increased vacancy within the existing stock. However, since LIHTC rents are too high to be competitive with the lower end of the private rental market, the effect is likely to be an increase in vacancies in the middle of the market, which is largely made up of units that are either adequate or in need of only modest repairs. Those units might be abandoned or their owners might reduce maintenance and tax payments in order to be able to rent the units at lower rents, thus diminishing the quality of the hous-

73. J. Rosie Tighe, Affordable Housing in Legacy Cities: Challenges and Solutions, Address at the University of San Francisco Law School Symposium (Jan. 29, 2016), *available at* https://www.youtube.com/watch?v=xFfO8e5-B8c [https://perma.cc/UNC2-X84M] (approximately at 0:55).

74. Some vacancy is needed in order to maintain liquidity in the housing market. While there is no firm number that represents the 'ideal' vacancy rate, it appears likely that healthy vacancy rates are in the range of 1.5% to 2.5% for owner-occupied housing, and 7% to 9% for rental housing, reflecting the significantly higher turnover in the latter stock; *see* Eric S. Belsky, *Rental vacancy rates: a policy primer*, *in* Housing Policy Debate 3:3, 793-813 (1992). Thus, in a city in which the housing stock was evenly divided between owner-occupancy and rental, the healthy vacancy rate should be between 4% and 6%. All or most of the excess over that figure, as shown for the cities in Table 5, represents surplus housing stock.

ing stock as a whole. In either case, the addition of an LIHTC project is likely to have deleterious effects on the housing stock and the neighborhoods in which the LIHTC units are located.

Table 5: Comparison of LIHTC Rent and Market Rent For a Two-Bedroom Unit in Selected Cities in 2014

	GARY IN	BALTIMORE MD	DETROIT MI	ST LOUIS MO	CLEVELAND OH
Median 2 BR market rent	$682	$996	$738	$865	$649
50% LIHTC rent	$719	$940	$728	$755	$705
60% LIHTC rent	$863	$1128	$873	$906	$846
Market rent as % of 60% LIHTC rent	79%	88%	85%	95%	77%
Percentage of units vacant	33.2%	20.0%	31.1%	21.4%	20.9%

Source: Market rents and vacant units, 2014 1-year American Community Survey (medians calculated by author); LIHTC rent calculated by author from data on HUD User at: https://www.huduser.gov/portal/datasets/il/il14/index.html.

Here the challenge of meeting housing needs and the challenge of preserving neighborhoods intersect. As shown above, building additional affordable housing, depending on the particular circumstances, may not contribute to and may even detract from stabilizing or rebuilding the neighborhood in which it is located. While Cleveland may not need more LIHTC projects, it contains large numbers of private market rental dwellings that accommodate the great majority of the city's low-income families. These, in many cases, could render attractive, good-quality housing for a small fraction of the cost of creating a new LIHTC unit. Using the same amount of public subsidy to upgrade one thousand houses, which are already renting at rents comparable to or lower than LIHTC rents, to a significantly higher quality without increasing the rent is likely to result in far greater benefit for both low-income tenants *and* their neighborhoods than building one hundred new LIHTC units renting for similar or higher rent levels,

and seeing close to that number of existing homes being abandoned or deteriorating as a result, and adding to the blight in the neighborhood.

This raises a further question. As a matter of policy, should the best strategy for housing America's lower-income population even involve *building* affordable housing projects? The French government administers robust affordable housing programs, which provide nonprofit housing agencies with a mixture of public grants, loans, and tax concessions, enable the agencies to buy houses and apartments from developers. These then become permanently affordable housing.[75] France also offers small investors generous tax breaks to buy condominium units in newly constructed buildings for the purpose of renting them out as middle-income housing,[76] as well as a combination of tax advantages and subsidized second mortgages to enable moderate-income households to purchase homes and apartments.[77] A similar model might be an alternative to the current LIHTC production model[78] and might potentially be more cost-effective and more conducive to social and economic integration in the United States.

At the same time, it is critical to change the manner in which mortgage lending is rationed, and restore access to homeownership for the vast number of middle-income Americans who may lack stellar credit scores or large down payments, but have good-enough credit to be acceptable risks, and enough income to afford homeownership. As discussed previously, large numbers of families want to become homeowners. Moreover, there is compelling evidence that with reasonable mortgage terms, pre-purchase education and counseling, and the availability of an adequate support system, the great majority of them can become successful homeowners.[79] Increasing moderate and mid-

75. *See* ALAN MALLACH, *France: Social Inclusion, Fair Share Goals, and Inclusionary Housing, in* INCLUSIONARY HOUSING IN INTERNATIONAL PERSPECTIVE 203 (Nico Calavita and Alan Mallach ed.2010).

76. *The 2015 Loi Duflot*, LOI DUFLAT FRANCE, http://www.loi-duflot.fr/definition-de-la-loi-duflot/ (last visited Nov. 23, 2016) [https://perma.cc/9C74-5VEU].

77. See Mallach, *supra* note 75, at 223.

78. I am not suggesting that such a model would necessarily replace *all* purpose-built construction of LIHTC or other subsidized housing. In high cost, high demand, areas such as San Francisco, construction of additional subsidized housing may be both useful and cost-effective, while under some conditions, construction of an LIHTC project may further neighborhood revitalization.

79. There is an extensive body of research documenting the value of pre-purchase counseling and education, and more limited research supporting post-purchase homeowner support, reflecting the fact that such programs are both more limited, and have emerged more recently, than pre-purchase counseling programs. *See, e.g.*, J. Michael Collins & Collin O'Rourke, *Homeownership Education and Counseling: Do We Know What Works?*,

dle-income homeownership in a responsible, sustainable fashion will benefit millions of families directly, and their neighborhoods indirectly. The United States fiscal system and capital markets are certainly capable of coming up with a way to give them that opportunity.

Freezing people out of homeownership by denying them access to mortgages forces more people into the rental market, leading to negative consequences both for households and neighborhoods. By increasing rental housing demand, mortgage rationing pushes up rent levels, while reducing access to rental units for those who do not have realistic non-rental housing options. Moreover, it is more than likely that a large number of those who are unable to buy because of lack of mortgage access are Black and Latino households, who may be disproportionately likely to buy homes in urban neighborhoods, which are precisely the same neighborhoods that are deteriorating at least in part because of the lack of homebuyers. Increasing mortgage access and rebuilding homeownership will not solve the problems faced by low-income renters, nor will it single-handedly reverse the decline of urban and suburban neighborhoods. It will, however, make it at least marginally easier, and in the case of the latter, perhaps substantially easier, to mount successful public policies that will solve them.

If the United States is not only to provide decent housing for those who need it, but also to rebuild its declining urban and suburban communities, we need to move toward a broader, more integrated way of thinking about housing and neighborhoods which places each in its appropriate context. We need to move to a way of thinking that recognizes that rebuilding neighborhoods involves far more than creating affordable housing or making physical improvements to the housing stock. Improving housing alone will not create a decent living environment, and, depending on how it takes place, may even undermine that environment at the same time as it creates housing that may be attractive and relatively affordable.[80]

RESEARCH INST. FOR HOUSING AMERICA SPECIAL REPORT (2011), *available at* http://massinc.org/wp-content/uploads/2011/06/76378_10554_Research_RIHA_Collins_Report.pdf [https://perma.cc/A3M6-HFJE]; Gabriela Avlia, Hoa Nguyen, & Peter Zorn, *The Benefits of Pre-Purchase Homeownership Counseling* (Working Paper) (April 2013), *available at* http://www.freddiemac.com/news/blog/pdf/benefits_of_pre_purchase.pdf [https://perma.cc/2VAW-L473]. . For a more extended discussion of the conditions of sustainable lower income homeownership, *see* Mallach, *supra* note 36.

80. A substantial amount of research has been conducted on the effects of subsidized housing development, particularly LIHTC projects, on neighborhoods; a number of studies have shown that neighborhood effects of such projects vary widely depending on both neighborhood characteristics and project features, and that in many cases, particularly in

In that light, while it is appropriate for community development and housing policymakers and practitioners in cities like San Francisco and Washington, D.C., where housing costs have spiraled far beyond the means of the majority of these cities' populations, to focus on the negative effects of gentrification, that too needs to be placed in perspective. More cities across the nation, particularly legacy cities like Cleveland or St. Louis, are seeing more neighborhoods decline than gentrify, by any reasonable definition of that notoriously slippery term.[81] Rebuilding viable neighborhood-level housing markets and economies, reducing concentrations of poverty, and creating more economically diverse communities in those cities is as important to their health and the health of their neighborhoods, as is preserving affordability and managing runaway gentrification in cities like San Francisco.

Different skills, perspectives, and public resources than those associated with development of affordable housing are needed to rebuild viable neighborhood markets and economies, and create economically diverse communities. Even with respect to the physical environment of urban neighborhoods, development of publicly subsidized housing projects may accomplish nothing toward the critical goal of drawing the private market-based investment that is needed to foster sustained neighborhood vitality. While public investment will be needed to start the process, for it to be successful, it must be designed to prompt such private investment and to build a self-sustaining market environment that ensures that houses are sold for competitive prices, owners maintain and improve their properties, vacant build-

struggling urban neighborhoods, the effects of the project may indeed be negative. *See e.g.*, Richard K. Green, Stephen Maplezzi, & Kiat-Ying Seah, *Low Income Housing Tax Credit Housing Developments and Property Values*, THE CTR. FOR URBAN LAND ECONOMICS RESEARCH (June 14, 2002), *available at* http://medinamn.us/wp-content/uploads/2014/04/Low-Income-Housing-Tax-Credit-Housing-Developments-and-Property-Values-UW-Study.pdf [https://perma.cc/SL45-F3BJ]; Kelly D. Edmiston, *Low-Income Housing Tax Developments and Neighborhood Property Conditions* (Federal Reserve Bank of Kansas City, Research Working Paper No. RWP 11-10, Dec. 2011), *available at* https://www.kansascityfed.org/publicat/reswkpap/pdf/rwp11-10.pdf [https://perma.cc/8EKU-8EMK]; and Lan Deng, *Assessing Changes in Neighborhoods Hosting the Low-Income Housing Tax Credit Projects* (University of Michigan Center for Local, State, and Urban Policy, Working Paper No. 8, 2008), *available at* http://closup.umich.edu/files/closup-wp-8-lihtc.pdf [https://perma.cc/HZ2P-ZGAB].

81. *See* Mallach, *supra* note 19; *see also*, John D. Landis, *Tracking and Explaining Neighborhood Socio-Economic Change in U.S. Metropolitan Areas between 1990 and 2010*, PENN INST. FOR URBAN RESEARCH (Nov. 2015), http://www.penniur.upenn.edu/uploads/media/PennIUR-Policy-Brief-Landis.pdf [https://perma.cc/FFN4-AU2D].

ings are quickly rehabilitated or replaced, and vacant lots are replaced with new housing.[82]

Rebuilding neighborhoods is not just about rebuilding housing stock and physical environment, but also about rebuilding neighborhood economies. This does not necessarily always mean creating jobs in the neighborhood, but is about ensuring, through whatever combination of education, training, transportation, and other measures are appropriate, that residents of the neighborhood are not marginalized; instead, that they have the opportunity to participate fully in the local and regional economy.

We should thus add one more piece to the picture, which should be a serious, sustained public sector initiative to revitalize struggling, declining neighborhoods. Such a program should be based on the fundamental premise that neighborhoods are communities made up of people rather than simply the sum of their housing stock and physical infrastructure, and should be designed to create sustainable mixed income communities. It would be complicated and not inexpensive, but we know a lot about what leads to a sustainable neighborhood. We just don't use what we know very well.

Finally, we need to put the pieces together. Far too often today, policymakers pursue housing initiatives that may undermine neighborhood vitality, not deliberately but as an unintended consequence; or pursue neighborhood revitalization through market-based strategies that may ultimately harm the most vulnerable households. While perfection is unattainable, it is not too much to ask that we try to design programs that work well together: Programs that focus on how to end housing insecurity, that create paths to homeownership, and that stabilize and revive distressed neighborhoods in ways that these three objectives could complement and reinforce rather than undermine each other. That should be our goal. It is a goal well worth our effort.

82. A public investment strategy designed to foster such market investment is outlined in Alan Mallach, *Create New Bond and Tax Credit Programs to Restore Market Vitality to America's Distressed Cities and Neighborhoods*, BROOKINGS (Nov. 2012), http://www.brookings.edu/~/media/research/files/papers/2012/12/06-federalism/06-land-use-bonds-taxes.pdf [https://perma.cc/AFQ4-L7BC].

Comments

Dark Innocence: Retraining Police with Mindfulness Practices to Aid in Squelching Implicit Bias

By CRISTAL HARRIS*

I was suddenly woken to yells and screams. I shared a bunk bed with my cousin. I had not heard much except "Leonard Brown!"[1] *"It ain't him! She ain't him!" My eyes went ablaze searching around frantically. Dreams broken to reality. There were guns everywhere. Men like giants. Deadly black pieces of metal drawn, ready to shoot at whoever dared move too swiftly. I looked to my aunt who was darting toward me. My heart began pounding. Then, over my bed cover, I see a group of men, a gang, pointing their guns directly at me. Just eight years old. I have done nothing. I am not him! It marred my view of "protect and serve" and branded it "surveillance and regulation." I jolted out of my bed, angrier than I had ever seen myself, ever. Instead of crying like any good child would do, I yelled and screamed, "Get out of my house! I hate you!" There were no apologies for the case of mistaken identity. One police officer replied "If you don't shut up I'll put you in juvenile hall!" Despite the events, I was not expecting that response. Maybe a "sorry," could have quelled my erratically pounding heart.*[2]

* Cristal Staffaline Harris is a third year law student at University of San Francisco School of Law. She has focused her studies on issues of race, law, and public policy. She hopes to begin her career as a criminal defense attorney. She also hopes to become a law professor with a focus in Criminal Law and Race.

1. Names have been changed.

2. My Comment will incorporate narrative as a means to lay the groundwork for critical discussions about race, policing, and mindfulness practice. Narrative is a welcomed and core part of Critical Race Theory (CRT) analysis. Professor of Law and Critical Race Theorist Cheryl Harris writes, "[t]he important contributions of CRT derive from the recognition that law does not merely reflect race as an external phenomenon; law and legal doctrine constitute an ideological narrative about what race and racism are." *See* Cheryl Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1216 (2002). Narrative is recognized as legitimate means to deepen the reader's understanding of how law is evidenced in people's everyday experience. Professor Delgado, a Critical Race Theorist at UCLA, emphasizes that narrative is "a call to action, a call to join in destroying the current story." Thus, narrative is used a means to tell a counter story while heightening awareness to minority group experiences with the law. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2430 (1988).

Introduction

SAN FRANCISCO IS ARGUABLY AMERICA'S MOST LIBERAL CITY.[3] Despite that badge of honor,[4] San Francisco's Black population experiences disparate treatment by its police.[5] The Burns Institute reveals that 40% of the people arrested in San Francisco are African American but only constitute 6% of the total San Francisco population.[6] Shockingly, African American female motorists are seven times more likely to be pulled over for traffic offenses than their White female counterparts.[7] These disparate outcomes have been explained by suggesting that African Americans commit more crimes and thus are arrested at higher rates; that assertion however belies the data. Studies have shown that Whites comprise a considerable 60% of San Francisco's fatal drug overdoses, yet are not incarcerated at the same staggering rate as their African American counterparts.[8] Taken together, the narrative suggests that African American people are being more harshly policed even though they commit crime at roughly the same or lesser rates than their white counterparts. These issues are not bound to Northern California but are present in other parts of California as well. In San Diego it was found that "[B]lacks were stopped twice as often . . . and that [B]lacks and Latinos are respectively searched at three and two times the rate of whites. However, during these searches, [B]lacks and Hispanics were found less likely to have engaged in criminal activity."[9] The report called for more investigation of data relating to the disparate outcomes.[10] Some, however,

3. Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605, 608 (2014).

4. Katie Dowd, *Is San Francisco really America's most liberal city?*, SFGATE (July 31, 2015), http://www.sfgate.com/bayarea/article/Is-San-Francisco-really-America-s-most-liberal-6412585.php [https://perma.cc/F44Y-KHCS].

5. Jeff Adachi, *Adachi: The Over-Policing of Black Women in SF*, SAN FRANCISCO PUBLIC DEFENDER (May 12, 2015), http://sfpublicdefender.org/news/2015/05/adachi-the-over-policing-of-Black-women-in-sf/ [https://perma.cc/8ME3-3YBJ].

6. Julia Beatty, *BI Policy Director Addresses Disparities in San Francisco Arrest Rates on KQED News (Audio)*, BURNS INSTITUTE (June 24, 2015), http://www.burnsinstitute.org/blog/bi-policy-director-addresses-disparities-in-san-francisco-arrest-rates-on-kqed-news/ [https://perma.cc/2HY9-B6PE].

7. *Id.*

8. *See* Adachi, *supra* note 5.

9. Pauline Repard, *Chief reports traffic stop race disparity*, THE SAN DIEGO UNION TRIBUNE (February 25, 2015, 1:17 PM), http://www.sandiegouniontribune.com/news/crime-courts-fire/sdut-racial-profiling-traffic-stops-police-minorities-2015feb25-htmlstory.html [https://perma.cc/4KWY-WN78].

10. *Id.*

are putting the blame squarely on pretexual police stops.[11] A pretexual stop occurs when the police stop someone under the pretext of enforcing the traffic code when in reality it was for an entirely different reason.[12] Professor Roberto D. Hernández from San Diego State University stated that the report shows a "disturbing trend" for high numbers of stops and searches of African-American and Latino drivers.[13]Margaret Dooley-Sammuli of the American Civil Liberties Union San Diego Chapter asks, "What do we do about it?"[14] Governor Jerry Brown was urged to sign and renew the old law against racial profiling because of the continual disparate outcomes against people of color.[15] Thus, AB 953 was born.[16] AB 953 is a California bill that requires police to record who they pull over and the race of those individuals.[17] The law also mandates the creation of the Racial and Identity Profiling Advisory Board (RIPA).[18] The Board makes suggestions on how to curb racial profiling in traffic stops, Terry[19] stops, and similar stops. It also further analyzes and concludes about the relationship between the disparate treatment of Blacks and Hispanics by police and racial biases held by police officers.[20]

The Board's stated goal is to "eliminate racial and identity profiling and improve diversity and racial and identity sensitivity in law enforcement."[21] Most germane here is RIPA's charge in section (h) of the bill which is to create "curriculum . . . and . . . include and examine evidence-based patterns, practices, and protocols . . . [that] include implicit bias."[22] It also aims to "curb the harmful and unjust practice of racial and identity profiling, and increase transparency and

11. *Id.*

12. Whren v. United States, 517 U.S. 806, 814 (1996).

13. Repard, *supra* note 9.

14. *Id.*

15. Kim Christensen & Matt Hamilton, *California's racial profiling law is 'terrible' legislation, police officials say*, L.A. Times (October 4, 2015, 9:58 PM), http://www.latimes.com/local/crime/la-me-brown-reax-20151005-story.html [https://perma.cc/H6VN-7TMH].

16. A.B. 953, 2015-2016, Reg. Sess. (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB953 [https://perma.cc/VS8V-KYSL].

17. Christensen & Hamilton, *supra* note 15.

18. A.B. 953, *supra* note 16.

19. Terry v. Ohio, 392 U.S. 1, 31 (1968) ("[Terry] stops happen when an officer has reasonable suspicion that a crime is afoot and that the supposed criminal is "armed and presently dangerous").

20. A.B. 953, *supra* note 16.

21. *Id.*

22. *Id.*

accountability with law enforcement agencies."[23] In response, police officers need to be trained to recognize stereotyped beliefs that affect their ability to make decisions while policing. These stereotyped assumptions police hold have a negative impact on people of color. The impact of these stereotypes has manifested itself in racial profiling and in increased stops and arrests of people of color.

First, this comment will explore the historical backdrop that informs what is currently known as "White Privilege."[24] It will first make a theoretical foundation for White Privilege as the basis of racial and identity profiling by using implicit bias theory to build a case for how White Privilege is a concrete set of tangible benefits denied to people of color. Next, the research will reveal how that concept of White Privilege causes police to turn a blind eye to crimes that Whites commit while allowing police to hyper focus on people of color. Police officers must be better trained to recognize and address their own stereotypes in which they choose to police. These stereotyped assumptions can have a two-prong effect: (1) over-policing and criminalization of people of color and (2) under-policing and innocence making of Whites who are committing crime at similar or higher rates than their ethnic minority counterparts. After drawing on these theoretical underpinnings, the research will turn to real life examples where these theoretical questions are evidenced. After that, this Comment will urge RIPA to include mindfulness practices as an essential part in its suggestions on reducing racial and identity profiling among police officers in California. Research will conclude that implementing an implicit bias curriculum with mindfulness practice at the core can resist the imbalanced effect of White Privilege in law enforcement. Lastly, this Comment will demonstrate how mindfulness practices can be carried out in a police training session and the importance of those mindfulness practices, and will theorize how police can benefit from these mindfulness practices.

I. The Problem of White Privilege Hampering Accurate Policing

> *I read the news article for myself. There was yet another officer devaluing black bodies. I wasn't eight years old anymore. I was twenty-five. I didn't have to fear. I didn't live in the ghetto. I did what I needed to do to stay*

23. Shirley Weber, *Bills to Curb Racial Bias in Policing (AB 953 and 619)*, ACLU of N. Ca. (https://www.aclunc.org/our-work/legislation/bills-curb-racial-bias-policing-ab-953-and-ab-619 (last visited Dec. 2016) [https://perma.cc/RN9J-BQNN].

24. *See supra* Introduction for definition of white privilege.

away from the law. I was a UCLA graduate and a USF law student. Police should know the difference, right? There is a difference between criminals and law-abiding citizens, unless the standard is black skin.
Officer Furminger wrote: "Yeah we burn the cross on the field! Then we celebrate Whitemas."
"Its [sic] worth every penny to live here [Walnut Creek] away from the savages."
"Those guys are pretty stupid! Ask some dumb ass questions you would expect from a black rookie! Sorry if they are your buddies!"
"Cross burning lowers blood pressure! I did the test myself!"
In response to a text saying "All niggers must fucking hang," Furminger wrote, "Ask my 6 year old what he thinks about Obama."
In response to a text from another SFPD officer regarding the promotion of a black officer to sergeant, Furminger wrote: "Fuckin' nigger."[25]

A. Focusing on White Privilege, Not Black Derogation: Implicit Biases with Real World Implications

1. Conscious Intent Racial Discrimination Standard Alone is Not Effective

The 2012 killing of Trayvon Martin by George Zimmerman sparked a national debate about the role of race in the killing of unarmed Black people. The debate focused on the role legal analysts, judges, lawyers, and police officers played in the outcome of cases where the victim was an unarmed black person. Jonathan Feinhold and Karen Lorang wrote an article focused on how race affects shooter bias and the irrelevance of conscious intent in those biased outcomes when making the decision to shoot Whites or Blacks.[26] Essentially, they suggest that conscious intent racism fails to give an accurate re-telling of why a person might shoot a black suspect more quickly than a white suspect. The authors use the killing of Trayvon Martin as a case study to reveal the inadequacies in a criminal justice system that only recognizes conscious racism and not unconscious racial bias.

25. Aleksander Chan, *The Horrible, Bigoted Texts Traded Among San Francisco Police Officers*, GAWKER (March 18, 2015, 1:53 PM), http://gawker.com/the-horrible-bigoted-texts-traded-between-san-francisc-1692183203 [https://perma.cc/2H97-G3RZ] ("A passel of racist, homophobic text messages sent between at least five San Francisco police officers were released last Friday as part of a motion by the U.S. Attorney's office to deny bail to Ian Furminger, a former SFPD sergeant recently convicted on federal corruption charges and a primary actor in the series of bigoted texts. The texts, from 2011–2012, initially implicated four current officers and Furminger—but by Monday, 10 more cops were placed under review by the SFPD's internal investigation for their alleged involvement. On Tuesday, San Francisco Dist. Attorney George Gascon announced a review of approximately 100,000 convictions for 'potential bias.'").

26. *See* Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISC. 210 (2012).

Trayvon Martin's parents suggest that George Zimmerman consciously racially profiled their son before killing him.[27] Many, including Zimmerman's attorney at the time, deny that Zimmerman was "a racist, or that [Zimmerman] was motivated by a dislike for African-Americans."[28] Zimmerman's attorney focused on what many commentators focused on: whether or not Zimmerman intended to kill Trayvon because of his race. The legal standard for racial discrimination is met when an "identifiable perpetrator treats a victim in a harmful way because of the victim's race."[29] Feinhold and Lorang then ask the question: "How do we know when someone acted *because of* race? [emphasis added]"[30] That decision rests on evidence of Conscious Intent Racial Discrimination ("CIRD").[31] The authors emphasize the attributes of a person who racially discriminated against another will: (1) not endorse racial discrimination in any way, (2) say that they did not possesses any intention to racially discriminate, and, (3) because of the lack of intention to discriminate, the perpetrator could not have acted because of race.[32] The simplicity in the previous conclusions is complicated by research in the fields of psychology and social cognition. Feinhold and Lorang's findings reveal the CIRD standard is incomplete to assess racially motivated crimes. Writing that "implicit biases [are] often undetectable through introspection and self-reporting, [yet] cause us to treat others differently because of their race."[33] Society punishes explicit biases. Society has not yet addressed how to redress effects from implicit biases latent in individual people and larger societal systems. Bias can be illustrated explicitly through CIRD and implicitly through biased outcomes. The next step is for implicit bias and explicit biases to be disaggregated.[34]

The Supreme Court's application of the CIRD standard was exemplified in *Whren v. United States* when it ruled that a policeman pulling over two black men for hesitating too long at a traffic light was not violative of the Fourth Amendment.[35] Officers Efrain Soto Jr., Homer Littlejohn and nine or ten plain clothed vice officers were patrolling

27. *Id.* at 216.
28. *Id.* at 217.
29. *Id.* at 218.
30. *Id.* at 219.
31. *Id.*
32. *Id.*
33. *Id.* at 220–21.
34. *Id.* at 221.
35. Kevin R. Johnson, *How Racial Profiling Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1045, 1053, 1062 (2010).

Southeast Washington in two unmarked cars.[36] The officers were patrolling in what the Supreme Court called a "high drug area."[37] Importantly, these were vice officers on the lookout for drug deals. "Vice officers ordinarily would not concern themselves with mundane criminal infractions such as violations of the traffic laws."[38] Further, District of Columbia police regulations permit plainclothes officers to make traffic stops "only in the case of a violation that is so grave as to pose an immediate threat to the safety of others."[39] Officer Soto watched Whren's Pathfinder, which, Soto later testified, remained stopped at the intersection for more than twenty seconds, then "sped off quickly" and turned without signaling.[40] That was enough for Officer Soto and the other officers to stop the vehicle. When the officers initiated the stop, they found that the driver, Brown, was holding what they suspected to be crack cocaine.[41] After a search of the car, officers recovered "two tinfoils containing marijuana laced with PCP, a bag of chunky white rocks, a large white rock of crack cocaine from the hidden compartment on the passenger side door, unused ziplock bags, a portable phone, and personal papers."[42] The author concludes, "What began as a seemingly routine stop for a minor violation of the traffic laws had turned into a drug bust."[43] Kevin R. Johnson, Dean and Mabie-Appallas Professor of Public Interest Law and Chicana/o studies, observes that the Supreme Court focused its attention on whether a reasonable officer would have made the same stop as opposed to whether the officer's motivation for the stop was pretextually based on race.[44] The Supreme Court refused to add any subjectivity of the officer to the inquiry. The result is that an officer's subjective mental state when stopping or arresting an individual, even if racially motivated, is not violative of the Fourth Amendment; such an inquiry, the Supreme Court concludes, belongs under the Equal Protection Clause.[45]

Johnson writes that an Equal Protection Clause remedy is "toothless" because it will leave Whren and Brown with "an unenforceable

36. *Id.* 1052.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 1053.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 1060.
45. *Id.* at 1063.

right."[46] Whren and Brown would have to prove that the officers were "motivated by racial animus"––a near impossible standard to meet if explicit forms of animus are not shown.[47] Johnson writes, "Such a state of mind, of course, is difficult, if not impossible, to establish without information about other criminal prosecutions."[48] Whren and Brown would need information about the police officers other drug busts and the races of those affected. Even with such information, clear evidence that at the time of the stop, Officer Soto and others stopped Whren and Brown because of their race would be circumstantial at best. A Conscious Intent Racial Discrimination standard of proof does not encompass the reality that, humans, including police officers, can also be motivated by implicit biases based on race.

2. Implicit Bias Must Be Considered in Any Inquiry About Policing

Implicit biases at their root are "negative beliefs (stereotypes) and attitudes (prejudice) against racial minorities."[49] Jerry Kang, a distinguished UCLA law professor, writes about implicit bias in his research entitled *Trojan Horses of Race*.[50] He focuses primarily on the idea that implicit biases are like Trojan horses that "hijack" our brains, making us act in ways against racial minorities without conscious considerations of those actions.[51] The result is that most people are not conscious of the biases they hold against racial minorities. Kang states that, "[t]hese implicit biases . . . are not well reflected in explicit self-reported measures. This dissociation arises not solely because we try to sound more politically correct. Even when we are honest, we simply lack introspective insight."[52] He based much of his research on the

46. *Id.*
47. *Id.*
48. *Id.*
49. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494 (2005).
50. Jerry Kang, *Bio*, JERRY KANG, http://jerrykang.net/bio/ (last visitied Nov., 2016) [https://perma.cc/66HB-T8T3] (Jerry Kang is Professor of Law, Professor of Asian American Studies, and the inaugural Korea Times–Hankook Ilbo Endowed Chair in Korean American Studies and Law at the University of California, Los Angeles School of Law. He is also the University's inaugural Vice Chancellor for Equity, Diversity, and Inclusion. Professor Kang's teaching and research interests include civil procedure, race, and communications. On race, he has focused on the nexus between implicit bias and the law, with the goal of advancing a "behavioral realism" in legal analysis. He regularly collaborates with leading experimental social psychologists on wide-ranging scholarly, educational, and advocacy projects. He also lectures broadly to lawyers, judges, government agencies, and corporations about implicit bias and what we might do about them.); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).
51. Kang, *Trojan Horses, supra* note 49 at 1508.
52. *Id.* at 1494.

findings in the Implicit Association Test ("IAT").[53] The IAT is a measuring tool to examine "how tightly two concepts are associated with one another."[54] Two racial categories like "black" and "white" would be presented with stimuli like the words "good" or "lazy."[55] The participant would have to press the left or right key on a keyboard when a word associated with that racial category appeared.[56] These decisions would take seconds to make; emulating the time it would take in real life to make similar decisions.[57] The results of the study found that "socially dominant groups have implicit biases against subordinate groups (White over non-White, for example)."[58] The study also finds that people have a tendency to automatically associate positive characteristics with their ingroups more easily than outgroups.[59] That phenomenon is known as outgroup derogation.[60] In the United States this manifests itself in biases against "[B]lacks, Latinos, Jews, Asians, non-Americans, women, gays, and the elderly."[61] The research further suggests that there is a co-variation relationship between having explicit biases against racial minorities and having implicit biases against racial minorities.[62] Put simply, someone can hold high levels of implicit bias against racial minorities without necessarily holding high levels of explicit biases against racial minorities. The next question becomes, "does implicit bias represent anything besides millisecond latencies in stylized laboratory experiments?" and "what is the evidence, for instance, that the IAT predicts any real-world behavior, much less anything that is legally actionable?"[63]

Kang focuses on a study by two behavioral economists. Marianne Bertrand and Sendhil Mullainathan sent out 1,300 resumes with identical credentials to employers who were hiring. Half had "White" names like Emily and the half other "Black" names like LaKisha.[64] The "White" resumes received 50% more callbacks than the "Black" resumes.[65] Kang writes, "A White higher-quality resume enjoyed a statis-

53. *Id.* at 1509.
54. *Id.* at 1509–10.
55. *Id.* at 1510.
56. *Id.*
57. *Id.*
58. *Id.* at 1512.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 1514.
63. *Id.*
64. *Id.* at 1515.
65. *Id.* at 1515–6.

tically significant 30% greater callback rate than the White standard resume. By contrast, a Black higher-quality resume received a statistically insignificant 9% greater callback rate than the Black standard resume."[66] Kang suggests that the surfeit of resumes passing employers' desks cause them to quickly scan the resumes, and many stop reading after seeing a "Black" name.[67] He writes, "This phenomenon also explains why higher-quality resumes do not produce much return for African Americans—the employer never actually gets to the details."[68] However, the study cannot distinguish which employers made their decisions at an unconscious or conscious level.[69] This aids us in understanding that racial discrimination plays a role in the labor market.[70] If such disparities exist in the labor market, which speaks to the fabric of American life, then the criminal justice system cannot be exempt.

University of Chicago Professor Joshua Correll focuses on biases in police officer and community member shooting response time with Black and White targets.[71] Correll writes, "Investigators have consistently found evidence that police use greater force, including lethal force, with minority suspects than with White suspects."[72] Correll cites a previous study he conducted with video game-like simulations.[73] Participants were asked to quickly and accurately respond to a "shoot" response when a suspect is armed and a "don't shoot" response when a suspect is not armed.[74] The study found that participants were faster and more accurate when shooting an armed Black man than an armed White man, and faster and more accurate when responding "don't shoot" to an unarmed White man than an unarmed Black man. Taken together it seems participants tend to view Blacks as armed even when they are not armed and Whites as unarmed even when they actually are. Correll's research states that "Officers serving in districts characterized by a large population, a high rate of violent crime, and a

66. *Id.* at 1516.

67. *Id.* at 1516.

68. *Id.*

69. *Id.*

70. *Id.* at 1516–7.

71. Joshua Correll, Bernadette Park, Charles M. Judd, Bernd Wittebrink, Melody S. Sadler, & Tracie Keesee, *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY AND SOC. PSYCHOL. 1006 (2007).

72. *Id.* at 1006.

73. *Id.* at 1007.

74. *Id.*

greater concentration of Black people and other minorities showed increased bias in their reaction times."[75]

Biases exhibited in the shooting example illustrate how quickly police must make decisions about whether to fire a lethal shot. These decisions are often made at the implicit level. Therefore, the Conscious Intent Racial Discrimination standard fails to encompass the wide range of reasons why there are disparate outcomes when Blacks and Whites are policed.

B. Ending Black Derogation Will Not End White Privilege: Stopping the Over-Criminalization of Blacks Will Not End the Innocence-Making of Whites.

1. Black Derogation vs. Implicit White Favoritism

Three law professors combined their academic knowledge to examine the ways Blacks and Whites are treated in the criminal justice system.[76] Smith, Levinson, and Robinson write that the criminal justice system has a disparate impact on Black people, but cannot explain why, despite efforts otherwise, it continues to "infect the criminal justice system so thoroughly."[77] They take issue with the goal of individuals and social science authors suggesting that removing the mistreatment of black people from the criminal justice system would make the system equal. However, removing black derogation from the criminal justice system would only be half of the story.[78] They ultimately conclude, "Even if we could eliminate the bias that these scholars have illuminated, racial disparities would persist because removing derogation is not the same as being race-neutral."[79] The authors' goal is to "rotate the flashlight ever so slightly, to reveal a rich and diverse form of implicit racial bias that has been overlooked in criminal law and procedure research. This is the bias of implicit favoritism."[80] This implicit favoritism happens when members of a certain group are treated preferentially with automatic positive stereotypes and attitudes by virtue of being a member of that group.[81] In the American criminal justice system, implicit favoritism is white favoritism.[82] This favoritism

75. *Id.* at 1014.
76. Robert J. Smith, Justin D. Levinson, & Zoë Robinson, *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871 (2015).
77. *Id.* at 877.
78. *Id.* at 874.
79. *Id.*
80. *Id.*
81. *Id.* at 874–75.
82. *Id.* at 875.

is exemplified when "legislators might see white 'meth' addicts as suffering from an illness and black 'crack' addicts as criminals."[83] These authors recognize that the people representing the criminal justice system are not always acting consciously nor are they intending to be racist when making decisions. The authors write, "[t]hese racial disparities are not predominantly a consequence of purposeful discrimination."[84] However, the authors understand that black derogation only speaks to half the necessary understanding of implicit bias in the criminal justice system. Implicit white favoritism must be addressed.

2. Implicit White Favoritism: Stereotype Threat, Boost, and Lift Theory

Explicit and implicit biases are one paradigm by which biases can evince themselves. In this paradigm the focus is squarely on how people of color are treated negatively. This comment now turns its focus toward those who are treated preferentially in the criminal justice system. Implicit White favoritism was silently working beside implicit bias against Blacks and people of color. The authors rested on Claude Steele and Joshua Aronson's research in which Steele and Aronson primed "[c]aucasian and African-American college students by asking them to identify their race just before [taking] a test."[85] Steele and Aronson found that African American students hesitated longer to answer questions and achieved lower than their Caucasian counterparts.[86] The two researchers found a complex relationship between African-American identity and negative stereotypes relating to ability.[87] This effect is called "stereotype threat,"[88] the phenomenon in which negative stereotypes affect the way a group performs.[89] However, Smith et. al. were more concerned with what makes White students perform well in the same environment. While Black students' performances were being threatened and worsened, White students' performances were being lifted. White students experienced "stereotype lift" which describes the bump that non-stereotyped members get simply by the activation of negative stereotypes about out-group members.[90] Smith et. al. relies on the research of social psychologists Greg

83. *Id.* at 876.
84. *Id.* at 877.
85. *Id.* at 892.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

Walton and Cohen to describe why White students do better when "comparing themselves with a socially devalued group, people may experience an elevation in their self-efficacy or sense of personal worth, which may, in turn, improve performance."[91] Although not telling alone, taken together "the research on stereotype boost and stereotype lift shows how implicit favoritism and the existence of positive stereotypes towards members of privileged groups can work on a nonconscious level and lead to various forms of automatic self-enhancement by members of those groups."[92] At the basic level, White performance is boosted because of a latent belief in not being associated with the negative belief in another out-group.

Smith et. al. rely on another study that "examined whether subliminal racial priming of white or black faces led to faster or slower identification of weapons."[93] Although there were compelling outgroup derogation effects against black people, Smith et. al. focused on "the favoritism that may occur because white citizens are automatically and cognitively disassociated with violence."[94] Whites were being favored with slower responses and identification of weapons. Whites were being thought of as non-violent or not closely associated with violence. Startlingly, this study found that "although the participants were entirely unaware of whether or not they had even been primed, simply seeing a white face for mere milliseconds made it significantly harder for them to perceive a weapon than when they saw no face at all."[95] Again, participants disassociated White faces with weapons or violence. White suspects armed or otherwise, enjoyed the privilege of being disassociated with violence or weapons that Blacks in the same study did not enjoy.

3. White Privilege In History: Whiteness as a Tangible Asset

"White Privilege is a set of tangible and real assets that are afforded to Whites through preferential treatment and positive stereotypes. Cheryl Harris[96] calls these benefits a form of "property."[97]

91. *Id.* at 894.
92. *Id.* at 894–895.
93. *Id.* at 898.
94. *Id.*
95. *Id.*
96. Cheryl I. Harris, Biography, https://curriculum.law.ucla.edu/guide/Biography/84 (last visited Nov. 2016) [https://perma.cc/M6CJ-EY5F].
Professor Harris has continued to produce groundbreaking scholarship in the field of Critical Race Theory, particularly engaging the issue of how racial frames shape our understanding and interpretation of significant events like Hurricane Katrina—("Whitewashing Race", in California Law Review), admissions policies ("The New Racial Preferences" in

"White identity is the basis of racialized privilege. That privilege has been ratified and legitimated in law as a type of status property."[98] Harris understands White privilege to be more than better treatment, but as a foundational assumption in U.S. laws and U.S. culture. Peggy McIntosh, an author of Critical Race Studies, continues by explaining that White Privilege is "an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks," White people can use at their will.[99] The primary benefit of White Privilege is that it is largely invisible to its holder. White becomes "normal." Nancy Chung-Allred writes in her work on Affirmative Action, "virtually all Black people notice the importance of race several times a day. White people rarely contemplate the fact of [their] Whiteness—it is the norm, the given. It is a privilege to not have to think about race."[100] Whites enjoy the "racelessness [sic] of White skin."[101] Further, Whites do not have to "think about race or how it positions them in society."[102] This absence of having to work, think, act, or achieve, yet demand certain treatments because of their race, is a privilege all in itself. To be a part of a line of Whiteness and receive White Privilege is not imagined, but a literal "marker of material, political, symbolic, and psychological worth" unlike blackness.[103] Chung-Allred further explains that the effects [of White privilege] penetrate all of society, creating a "societal norm" that all individuals

California Law Review) (with Carbado), and anti-discrimination law ("Reading Ricci: Whitening Discrimination, Race-ing Test Fairness" in UCLA Law Review (with West-Faulcon)). She has also lectured widely on issues of race and equality at leading institutions here and abroad, including in Europe, South Africa, and Australia, and has been a frequent contributor to various media outlets on current events and cases involving race and equality. Professor Harris has served as a consultant to the MacArthur Foundation and has been on the board of leading academic societies, including the American Studies Association. She has served as faculty director for the Critical Race Studies Program at UCLA Law School and has been widely recognized as a groundbreaking teacher in the area of civil rights education, receiving the ACLU Foundation of Southern California's Distinguished Professor Award for Civil Rights Education.

97. See Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV 1707, 1714 (1993) (discussing Whiteness as a certain list of abilities and privileges as tangible property to which one can demand by virtue of their Whiteness).

98. *Id.*

99. *Id.*

100. Nancy Chung Allredd, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 ASIAN AM. L.J. 57, 62 (2007) (quoting Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999)).

101. George J. Sefa Dei, *White Power, White Privilege*, 244 COUNTERPOINTS; PLAYING THE RACE CARD: EXPOSING WHITE POWER AND PRIVILEGE 81, 84 (2004).

102. *Id.*

103. *Id.* at 92.

in the community are judged against.[104] White predomination has touched every area of modern American society and the forced subordination of people of color it was built upon.[105] Cheryl Harris eloquently writes:

> Slavery linked the privilege of whites to the subordination of blacks through a legal regime that attempted the conversion of blacks into objects of property. Similarly, the settlement and seizure of Native American land supported white privilege through a system of property rights in land in which the "race" of the Native Americans rendered their first possession rights invisible and justified conquest.[106]

Harris conceptually links African enslavement and the snatching away of Native American land to property rights dedicated to sole use by Whites. Black bodies were for sole use of Whites through enslavement and other apartheid laws. Native American land was for the sole use of Whites through laws that reaffirmed the White American government while disenfranchising the Native American government. As Whites accumulated wealth over time, Whiteness became synonymous with rights to property, land, finance, other areas of wealth, and other positive stereotypes not afforded to people of color. Harris states, "Only white possession and occupation of land was validated and therefore privileged as a basis for property rights. These distinct forms of exploitation each contributed in varying ways to the construction of whiteness as property."[107]

Whiteness is then an attribute to emulate, and the standard for which minority groups are compared against. How then does such a privilege operate in the policing context?

4. White Privilege Cause Police to Turn a Blind Eye to White Crime

Mara Shulman Ryan pens an article entitled "Criminal Law––Invisible in the Courtroom: Modifying the Law of Selective Enforcement to Account for White Privilege."[108] She uses an incident in which two White students attacked a Black student as a premise for examining white privilege in the criminal justice system. Two white students (Bowes and Bosse) "viciously taunted" a Black student (Vas-

104. Allredd, *supra* note 99 at 62.
105. Harris, *Whiteness As Property*, *supra* note 97 at 1721.
106. *Id.*
107. *Id.* at 1716.
108. Mara S. Ryan, *Criminal Law–Invisible in the Courtroom Too: Modifying the Law of Selective Enforcement to Account for White Privilege*, WEST. NEW ENG. L. REV. 301 (2012).

sell), broke the window to his dormitory, and upon entrance, physically assaulted him, going as far as breaking the student's nose. Vassell, believing his life to be in danger, defended himself with a knife.[109] Even after being stabbed, Bowes and Bosse continued their racist epithets against Vassell.[110] Even though Bowes and Bosse instigated the fight, only the Black student, Vassell, was arrested and prosecuted.[111] The author believes that White privilege played a pivotal role in why Bowes and Bosse were not prosecuted for their actions.[112] Vassell's attorney defended alleging selective prosecution.[113] In selective enforcement cases the defense would have to prove that the Black student was arrested or prosecuted for belonging to a racial minority group. Ryan finds the flaw in that the real issue may be Bowes and Bosse, the two white students, evaded arrest because of their Whiteness.[114] The selective enforcement law leaves a steep hill for Vassell's defense attorney to climb. Particularly since the focus is on how Vassell, the Black student, received black derogation as opposed to how Bowes and Bosse may have been recipients of preferential treatment based on their Whiteness. Ryan writes, "Another flaw with existing selective enforcement law is that it only deals in half-truths."[115] She urges that it keeps the invisible knapsack of White Privilege completely shrouded, stunting the goal the law of selective enforcement tries to address: ending racial bias in the enforcement of criminal laws.[116] The policemen who arrested Vassell, ignored witness statements that Bowes and Bosse instigated the attack and used their discretion to arrest Vassell, the true victim of the crime. That exercise of discretion resulted in their failure to detain or arrest Whites who commit acts for which their African American counterparts would often be detained or arrested."[117] Likewise, the prosecutors characterized the victim, Vassell, as a "serious threat," even though Vassell had no prior incidents of arrest and Bowes and Bosse had a long history of engaging in criminal behavior.[118] As a result of Bowes and Bosse's Whiteness, both men received the benefit of the doubt in all aspects of the

109. *Id.*
110. *Id.* at 302.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 303.
115. *Id.* at 303–04.
116. *Id.*
117. *Id.* at 305.
118. *Id.* at 306.

case.[119] If Vassell raised the issue of White privilege in his motion to dismiss for selective prosecution it would have provided him with "meager doctrinal justification upon which to rest his legal argument."[120] White privilege is so invisible in the courtroom that no formal mechanism exists for people of color to raise the issue of white preferential treatment.[121] Ryan concludes, "the courts cannot effectively address instances of racial injustice in the enforcement of criminal laws until they contend with white privilege, a factor contributing to many instances of selective enforcement."[122]

II. Awakening: Mindfulness Practice as an Integral Asset to Uncovering White Privilege

> *My heart was light and heavy. I sat in her office, flustered. I was angry. I looked up to her face.*
>
> *She was calm, cool, and relaxed. She asked how I was, then handed me a rock.*
>
> *It was smooth, beautiful, and carefully crafted. Her smile would help carry a burden.*
>
> *The burden of blackness, womanliness, being strong, staying strong.*
>
> *How did she become a black female law professor? There are so few. Carrying her grandmothers' prayers, the rock read, "COURAGE."*
>
> *I needed courage now more than ever.*[123]

A. Including Mindfulness Practice in Implicit Bias Training

The RIPA committee's charge in section (h) of the AB 953 bill is to create "curriculum . . . and . . . include and examine evidence-based patterns, practices, and protocols . . . [that] include [ ] implicit bias."[124] In the policing context, implicit bias training (IBT) encompasses teaching officers to learn skills that will aid in reducing and managing their own biases.[125] Implicit Bias Training is focused on unearthing biases that combat racism. Robert J. Smith, a visiting Assistant Professor of Law at DePaul University, writes that over a five to six-hour time period the typical IBT session would include:

119. *Id.*

120. *Id.* at 318.

121. *Id.* at 325.

122. *Id.* at 339.

123. A conversation with Professor Rhonda Magee during her office hours. Spring 2015.

124. A.B. 953, *supra* note 16.

125. Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 297 (2015).

> [A] section that explains the nature of bias and highlight contemporary research on implicit bias; a section that provides examples of how biased policing has a negative impact on communities and leads to inefficient policing; and finally a section that seeks to provide officers with tools for avoiding biased policing through better control of their automated behavioral responses.[126]

Although facially mundane, addressing issues of race and bias in the policing context is difficult to separate from thoughts, emotions, and incidents, negative or positive, police may have previously experienced. These previous experiences, thoughts, and feelings must be tackled in order for IBT to achieve its end goal of more unbiased policing.

Laura King, Commander of the McHenry Illinois Police department, writes in her article "Bringing Mindfulness to Police Training," that when police act in high stress situations they call upon two core concepts: conditioning and neuroplasticity.[127] Conditioning involves the actions police officers because of pure repetitive training.[128] "Neuroplasticity is the lifelong capacity of the brain to create new neural pathways."[129] Commander King writes, "In lay terms, [neuroplasticity] allows us to rewire the brain through conscious effort, so that the brain is able to function at a higher level of performance during times of stress."[130] Increasing the neuroplasticity of the brain is important during IBT because talking about race can be inherently stressful. She cites UCLA's study on mindful empathy stating in part that, "combining modern science and ancient wisdom, we can unlock the secrets to expanding the potential of the human brain."[131]

Mindfulness practice grants the practitioner more "empathy or non-judgment to the process" so that the practitioner can observe and contribute without personalizing the events before him.[132] In other words, a police officer practicing mindfulness would face high stress situations with more clarity of mind to make more unbiased decisions. A key component of Implicit Bias Training is coming with an open mind. Mindfulness practices can aid in police officers in achieving an

126. *Id.* at 300.

127. Laura King, *Bringing Mindfulness to Police Training*, POLICE CHIEF MAGAZINE, 60 (Sept. 2015), http://www.policechiefmagazine.org/wp-content/uploads/Officer_safety wellness_September2015.pdf [https://perma.cc/8T6P-G86E].

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

open and unbiased mindset when tackling issues of race. Commander King theorizes that:

> Police professionals can become so aware of their bodies that when stress is elevated and their amygdala is engaged—trying to create an animalistic fight-flight-freeze response—[police professionals] can learn to notice the onset of this [response] and choose to engage the prefrontal cortex, the thinking brain, when formulating a response.[133]

Simply put, mindfulness practice will allow police to think about their actions before reacting to the situation.

Commander King warns that no amount of mindfulness practice can eliminate an emergency response, but mindfulness practice can allow the practitioner to be in more control of his or her response to stimuli. The author rests on an MRI study done on participants who meditated for twenty-seven minutes a day for eight weeks.[134] It was found that participants rebuilt grey matter in parts of their brain and reported experiencing more peace during the time they practiced meditation.[135] Her hope is that healthier officers are developed and who can show increased capacity to make thoughtful decisions during times of high stress.[136] Commander King's hope is important, as according to the Bureau on Labor Statistics, police work is physically and mentally demanding,[137] reporting 123 police officer deaths in the year 2015 alone.[138] Approaching people of various ethnicities in an unbiased and mindful way is a key component to equal treatment of people of color in the criminal justice system. Further, it helps to ensure officers are aware of their hidden biases that privileges Whites in areas of policing.

B. Basic Mindfulness Practices to Include in Police Officer Implicit Bias Training

Mindfulness practice is one avenue to equip police officers to be more aware of their surroundings, the person they are talking to, and their internal responses to situations before them. The benefits of mindfulness practice increase as the practitioner continues prac-

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Officer Deaths by Year*, NATIONAL LAW ENFORCEMENT OFFICERS MEMORIAL FUND http://www.nleomf.org/facts/officer-fatalities-data/year.html (last visited Nov., 2016) [https://perma.cc/42TX-8VX9].

tice.[139] As a student in Professor Magee's spring 2015 *Race and the Law* class, held at the University of San Francisco School of Law, the class integrated mindfulness practices as a core component of teaching and learning.[140] Mindfulness practices incorporate meditation as a key component. Kabat-Zinn, a leader in mindfulness meditation, defines it as, "letting the mind be as it is and knowing something about how it is in this moment."[141] Mindfulness allows the mind to focus on the present while letting go of judgment and analysis about what comes to the mind.[142] In class, Professor Magee[143] acknowledged the emotions and experiences her students shared surrounding the topic of race.[144] Her best asset was her ability to channel her students' emotions into productive outlets that were founded upon mindfulness practices.

The mindfulness practices listed below can introduce police officers to new ways of improving awareness of the self and the emotions. These experiences with race have often been painful, difficult to talk about, and difficult to express. The list of mindfulness practices aid in beginning the dialogue around the implicit bias of White Privilege and the ways it can be combatted in day-to-day policing.

1. Forgiveness Practice

This practice[145] began with Professor Magee calling our attention to a topic the class had focused on in class or in our lives. She asked us to get that moment, instance, or feeling into our minds, and then to mentally stare at what was bothering us with clarity. We were invited to close our eyes or to keep them open. She then encouraged us to employ whichever was more comfortable. Next she challenged us to forgive whatever that person, place, thing, or emotion each student wanted to. We needed to practice forgiving, even if the only thing deserving forgiveness was the practitioner. This became a challenging and uncomfortable practice very quickly. The difficulty in the practice depended on the level of forgiveness the practitioner addressed.

139. King, *supra* note 126 at 60.

140. Rhonda Magee, Professor, University of San Francisco School of Law, Race and Law Class Lecture (Jan. 2015).

141. Tamara Kuennen, *The M Word*, 43 HOFSTRA LAW REV. 325, 334 (2015).

142. *See* Magee Lecture, *supra* note 140.

143. *Rhonda Magee*, UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW https://www.usfca.edu/law/faculty/rhonda-magee (last visited Dec., 2016) [https://perma.cc/JC5E-X2PF].

144. *See* Magee Lecture, supra note 140.

145. Rhonda V. Magee, *The Way of ColorInsight: Understanding Race and Law Effectively Through Mindfulness-Based ColorInsight Practices*, GEORGETOWN L.J. 1, 45 (2015).

This practice aids police in starting anew when they experience negativity in the workplace. Forgiveness practice makes the forgiver, or practitioner, recognize that they have something, someone, or some situation that has bothered them in a material way. Then they acknowledge the effect. Lastly, they forgive the person, moment, or situation, thus allowing the officer to be more aware of what emotions are happening inside him or herself. Then, the officer starts anew by combatting negativity with forgiveness. The hope is that the officer will not make decisions based on the prior situation that hurt them, but move forward making an unbiased appraisal of their new experiences.

2. Sitting Together with Suffering

This practice[146] began with Professor Magee talking about a recent news update. Professor Magee would use current news as a means to explore the topic of race. In this practice, Professor Magee explained the belief that humans naturally flee from suffering and pain and are in constant pursuit of happiness.[147] She explained the importance of facing suffering and not shying away from it. She asked us to focus our entire consciousness on the issue she presented us. We sat in our chairs, silently. She then called for us to "sit with suffering."[148] She asked us to think about the lived experiences of those going through suffering. Calling us to consider what it would be like to go through that level of suffering. Without judgment, allow ourselves to stand in suffering with the experiences she presented to us. The goal of the practice is to "honor the suffering that ripples from this incident."[149]

The practice will aid police officers in extending compassion for those who are suffering. This way, police can be aware of and tap into compassion. Police then further recognize that the people they protect and serve experience hurt, pain, suffering, and can then, to an extent, identify with that suffering. This practice asks the practitioner to be conscious of the life, history, and presence of any individuals encountered. This is important in implicit bias training because cross-racial encounters can be misinterpreted. With this practice the officer would be equipped to recognize that both she/he and the person

146. *Id.* at 44.
147. *Id.*
148. *Id.* at 44.
149. *Id.*

have experienced negativities in life, and can both be compassionate toward that suffering.

3. Closing the Loop

Professor Magee told the group to pick one partner. During the time of the exercise one person would be given an allotted time to speak about a topic or experience that the moderator, Professor Magee, would choose. Once Speaker 1 used their allotted time, then Speaker 2 would be allowed to respond and the response would be shorter than Speaker 1's initial allotted time. When Speaker 2 responded she could only respond to the things that Speaker 1 previously mentioned. Speaker 2 was encouraged to use phrases such as, "What I heard you say was. . ." or "What I understood you to say was. . ." Lastly, Speaker 1 would be given an additional allotted time to speak. That time would be shorter than Speaker 2's response time. Speaker 2 could further explain what may have been left out when they first spoke, or respond to new issues that Speaker 2 raised. For me, the practice allowed me to focus on someone else's experience beside my own. It encouraged me to think of someone else's suffering and not avoid their pain as I could only respond to what was presented to me.

This practice can aid police officers in understanding the lived experiences of the people they serve. This practice, if used over time, could and should engrain into the officer a routine of listening to understand anyone they interface with. In other words, they would be able to mindfully engage in meaningful conversation that effectuates peacemaking. Police officers often run, walk, and drive into highly hostile situations hysterical people or into dire emergencies. However, police also can enter rather calm situations and needlessly escalate them. Cross-racial dialogue can complicate simple communications and can sometimes lead to lethal misunderstandings. Approaching any and all situations seeking to understand can alleviate possible miscommunication.

III. How IBT, Mindfulness Practice and White Privilege Intersect

AB 953 seeks to overhaul and strengthen the way that California's police departments address racial profiling. In part, it will achieve its goal through extensive research by recording the race of individuals stopped by the police. AB 953 mandates the creation of the RIPA committee. This committee will make informed recommendations on the

best strategies to combat implicit biases in policing. For that goal to be accomplished, the committee must consider how the criminal justice system has historically focused on black derogation and completely ignored its reification of White Privilege. Understanding white privilege and the ways it works in policing will highlight the dual nature of issues of race in the criminal justice system. Mindfulness practice should be used as a mechanism to grapple with issues of race in policing. Otherwise, as Commander King writes, police can learn how to be less biased through bias reducing drills but be severely ill-equipped to make more informed and unbiased decisions when interfacing with people of color.[150]

Conclusion

This Comment offers an honest glance at police bias and how those biases negatively affect people of color while positively affecting Whites. Police bring their own biases when they come in contact with people of color. Police must learn and use practices that will reduce the stressors of interracial contacts in everyday policing. This Comment gives the RIPA committee ammunition to consider mindfulness practice in trainings on implicit bias. The practitioner of mindfulness practices will be made aware of her own latent biases that bear on how she performs her job. These biases may be why she/he ignores a White individual who is speeding twenty miles above the marked speed limit whilst hyper focusing on a Black woman who is standing at a corner for what is interpreted as too long of a time period. Taken together, more research needs to be conducted about the impact of White Privilege on the ways police choose how to do their job, and chiefly whom they decide to stop. AB 953 will begin the conversation about the ways that people of color are over policed. This Comment adds to the goals of the RIPA committee by highlighting new avenues to address implicit bias. The hope is that the findings within this Comment will open a necessary dialogue about the ways White crime is largely ignored by the police.

150. King, *supra* note 126.

Warranty and Indemnity Insurance: Proliferation of Moral Hazard or Legitimate Risk Mitigation Tool?

By MAX HYATT*

Introduction

HOW OFTEN DOES A PERSON THINK ABOUT MERGERS AND ACQUISITIONS? How often do they think about the promises (warranties and indemnities)[1] each party makes in those transactions? Finally, how often does anyone outside of the small grouping of insurance companies, who insure these transactions, think about the effects of their policies? In fact, after speaking to lawyers and business people engaged in mergers and acquisitions about this Comment, only a handful even recognized the niche specialty of warranty and indemnity (W&I) insurance. We are seeing an increase in the popularity of W&I insurance across the globe. As Rob Brown, a partner at Latham & Watkins stated, "This trend is becoming global . . . [T]here has been a big uptick in the [United States] and Europe during the last five years and increasingly we are seeing the same thing in Asia."[2]

We do not yet know much about the effect of W&I insurance on the global merger and acquisition (M&A) market. Although available for decades, only recently has W&I insurance started to be used as a real tool for closing complicated deals.

At a baseline level, warranties and indemnities are a means of reallocating risk between vendors and buyers. They also, via "disclosure" against warranties, help elicit information. In English law, the

* Max Hyatt earned his JD (cum laude) and MBA (Beta Gamma Sigma) from the University of San Francisco. Currently a Corporate and Securities Associate at Baker McKenzie, Max has a particular interest in international corporate work and has an affinity for motorsports in his spare time.

1. Bruce Hanton, *Warranties and Indemnities*, ASHURST QUICKGUIDES (March, 2010), https://www.ashurst.com/doc.aspx?id_Resource=4639 [https://perma.cc/YJK5-YLTP].

2. Rod Brown, *The Rise of Warranty and Indemnity Policies in M&A Deals*, LATHAM & WATKINS, LLP (Sept. 17, 2014), https://www.lw.com/thoughtLeadership/warranty-indemnity-policies-m-and-a-deals [https://perma.cc/8MJR-BYCN].

fundamental principle of *caveat emptor* ("buyer beware") applies. This means that, in a sale and purchase transaction, the law will not generally afford the buyer any protection. The buyer may seek protection by means of warranties and indemnities while the provider may attempt to protect its place by denying certain warranties and indemnities, restricting their range or the situations when claims are brought, or by disclosing against warranties.[3]

This Comment is intended to call attention to the emergence of W&I insurance, the current potential pitfalls that it presents, and offer a summary of future research that must be done before we can make any solid conclusions on W&I insurance effectiveness on the global market.

In Part I, I will summarize the current state of W&I insurance, including reasons why buyers or sellers would choose to take out one of these policies. In Part II, I will focus on the 2008 financial crisis and provide a broad overview of what occurred and how it relates to moral hazard. Part III will cover moral hazard, both its origins and what its implications are for legal analysis. Part IV offers my perspective on the lessons we can learn from the financial crisis and why we need to think about the purpose of W&I insurance.

Part I: Warranty and Indemnity Insurance

What is W&I Insurance? Buy-side and Sell-side Policies.

Warranties and indemnities at their simplest forms are promises exchanged by the contractual parties. Warranties are statements made by the seller that certain facts are true and indemnities are promises from the seller to provide damages to the buyer if certain events occur.[4]

A warranty is a contractual statement of fact made by the warrantor to the warrantee, which is usually contained in a share or asset purchase agreement. Warranties often take the form of assurances from the seller as to the condition of the company or business. An award of damages for breach of warranty aims to put the claimant in the position it would have been in had the warranty been true, subject to the usual contractual rules on mitigation and remoteness. In contrast, an indemnity is a promise to reimburse the claimant in respect to loss suffered by the claimant. The purpose of an indemnity is to provide dollar-for-dollar compensation with respect to a specific loss.

3. Hanton, *supra* note 1.
4. *Id.*

Indemnities can be used in circumstances where a breach of warranty may not necessarily give rise to a claim in damages (for example, where the seller has disclosed against the warranty or because the loss arises from a third party claim). In addition, when relying on indemnities, generally the innocent party is not obligated to mitigate the loss.[5]

Warranties and indemnities are a staple of any merger or acquisition of both asset and share sales.[6] They are frequently the most negotiated clauses in the agreement because they can result in a large variance of damages in the event of a breach. There are two main purposes of W&I in M&A transactions. One is to help ensure that the price paid by the buyer reflects what the seller has told them about the transaction. If the information is not correct, then a damage claim will reduce the price received by the seller.[7] Keeping the seller honest is another vital function of W&I's. The seller has a strong incentive to ensure quality due diligence on both sides of the deal because it reduces the probability of a warranty claim arising.[8] Both of these purposes are distorted by the introduction of insurance because the seller now has reduced his or her liability and consequently, his or her incentive to fulfill these purposes.

At its core, W&I insurance is a risk management tool. W&I insurance packages come in two separate policies to protect each side of the transaction. These are described as either sell-side or buy-side policies.[9] Sellers can utilize it by increasing their rate of return and, particularly beneficial to private equity houses that engage in a high rate of transactions, it can provide a clean exit.[10]

Economically, the seller is no longer the financially liable party. Principally, the buyer no longer needs cover for liability claims against the seller, e.g. through retention of part of the purchase price or deposit (holdback) of part of the purchase price with a trustee (escrow).

5. *Id.*

6. Baden Furphy, Damien Hazard & Ben Landau, *Market trends in W&I Insurance*, LEXOLOGY (May 23, 2013), http://www.lexology.com/library/detail.aspx?g=36cf2f8f-f443-45bc-8a4d-2e1652d6eda4 [https://perma.cc/LW8N-AV5Z].

7. Geoff Hoffman & David Gerber, *M&A warranty and indemnity insurance: a buyer's perspective*, CLAYTON UTZ (June 9, 2009), https://www.claytonutz.com/knowledge/2011/june/m-a-warranty-and-indemnity-insurance-a-buyer-s-perspective [https://perma.cc/C4NQ-CJDS].

8. *Id.*

9. Furphy et al., *supra* note 6.

10. Philip Broke, John Cunningham, Edward L. Keller & Veronica Carson, *Overview of recent trends in Warranty Insurance in M&A Transactions*, LEXOLOGY (June 2, 2014), http://www.lexology.com/library/detail.aspx?g=dfe34b03-2ded-4441-927a-fb51b4a6d59e [https://perma.cc/HCG9-P9CW].

The seller is now able to immediately pocket the full purchase price. "Such a 'clean exit' is particularly important for financial investors acting as sellers."[11]

If buyers are concerned about recovering from a seller, they can add some financial protection or increase the attractiveness of their bid by providing the W&I insurance in their offer.[12] A majority of the W&I insurance policies being written today are buy-side policies[13] for several reasons. The most practical advantage to a buy-side policy is if a claim arises, the buyer does not have to deal with the seller at all, they simply work with the insurance broker or underwriter to seek recovery.[14] At first glance, this advantage might seem frivolous, but many times the seller no longer has any assets after these sales or is shielded from liability—making recovery very difficult or impossible.

The other critical difference between buyer-side and seller-side policies is that with a buyer policy, if the seller commits fraud (for example, if the seller has been fraudulent in giving a representation), then the policy would still payout. This is because the buyer is the insured party and it has neither been fraudulent nor has it fallen foul of the obligation to make full disclosure to the insurers.[15]

This fraud exemption is important because fraud is commonly excluded from coverage in W&I policies. Buyer-side policies have these two distinct advantages and in an increasingly competitive M&A environment, "sweetening" the deal with a buyer-side policy can be the difference between a failed deal and beating the competition.[16]

Certain risks are typically excluded from W&I policies. Fraud is excluded in seller-side policies as is common with all types of insurance. For instance, forward-looking warranties, profit milestones, and revenue projections are excluded because they are inherently speculative post-closing.[17] Known risks and penalties or fines stemming from those risks, identified in due diligence, are excluded because they should be priced into the deal by the parties.[18] These risks, such as

11. Jörg Lips, *W&I–insurance in M&A-transactions: effective protection of superfluous product?*, LEXOLOGY (July 31, 2013), http://www.lexology.com/library/detail.aspx?g=f9d80686-8287-4825-8ef2-a3a1508127fc [https://perma.cc/B8KH-SHRT].

12. Broke et al., *supra* note 10.

13. Furphy et al., *supra* note 6.

14. Brown, *supra* note 2.

15. *Id.*

16. Nick Humphrey, *Key issues in insuring an M&A deal*, LEXOLOGY (Feb. 28, 2011), http://www.lexology.com/library/detail.aspx?g=4ec09a3e-72a1-4aa4-8ade-c734f8e88fea [https://perma.cc/HJ6E-VLHX].

17. Lips, *supra* note 11.

18. Hoffman & Gerber, *supra* note 7.

fraud and known risks, do not change from the signing of the sale agreement and the completion of the agreement. W&I breaches which occur in this time frame between the signing and completion are known as "new breaches."[19] As previously discussed, sellers are looking for clean exits, so it is standard practice to include a clause stipulating that the seller will not be liable to the buyer for loss arising after the signing of the sale agreement, which makes sense due to changing responsibilities and fluctuations. The buyer would have no recourse against the seller for these liabilities if one arose during this time frame without W&I insurance. However, new breaches were not typically covered when W&I insurance started to be implemented, but in certain areas of the globe, mainly Asia and Australian markets, it is achievable with some insurers.[20] "The insurers' [initial] rationale was that the seller had control of the business between signing and completion, but it was the W&I insurer (not the seller) who carried all the risk for a breach of warranty or indemnity event."[21] To address this risk, those insurers who are willing to cover new breaches charge a material increased premium.[22] Even though there are some caveats to W&I coverage, for the right price, you can negotiate the right policy for the specific deal.

The Premium Price of W&I Insurance

You can craft an insurance package for anything—Lloyds of London famously crafts insurance packages for commercial spaceflight,[23] celebrities have reportedly taken out insurance policies for certain body parts,[24] and companies take out policies covering a wide range of liabilities.[25] The only barrier, it seems, is cost of the policy. A key development to the emergence of W&I insurance as a viable product for a wide range of deals is the premiums have decreased dramatically. Fifteen years ago the premiums were around 5% of the liability limit, meaning if the policy covered up to $30 million, the premium

19. Furphy et al., *supra* note 6.
20. *Id.*
21. *Id.*
22. *Id.*
23. *See generally* LLOYD's, https://www.lloyds.com/ [https://perma.cc/FL98-WGUQ].
24. Vince Veneziani, *The 15 Most Bizarre Insurance Policies Ever Written*, BUSINESS INSIDER (Mar. 18, 2010), http://www.businessinsider.com/10-of-the-worlds-craziest-insurance-policies-2010-3?op=1 [https://perma.cc/CE9W-BJXM].
25. *See generally* Newtek Small Business Authority, *13 Types of Insurance a Small Business Owner Should Have*, FORBES (Jan. 19, 2012), http://www.forbes.com/sites/thesba/2012/01/19/13-types-of-insurance-a-small-business-owner-should-have/ [https://perma.cc/D6Z4-GHDR].

would cost $1.5 million.[26] Today, a similar policy would only cost 1% to 2%, with risky deals commanding up to 3%.[27] The resulting premium cost at 2% would only cost the insured $600,000—dramatically less than fifteen years ago.[28] With many insurance carriers offering different policies around the world, "many of whom are Lloyd syndicates,"[29] the price will likely continue to decrease. In Europe, the minimum premium is about 40,000 euros, which means small deals below 3 million euros are not economically practical when broker fees and taxes are applied.[30] Some insurers can only cover up to a 50 million euro claim, representing deals in excess of 3 billion euros; these larger deals often require syndication.[31]

The factors that inform what percentage the insurance companies charge are holistic and incorporate similar metrics as those the buyer would consider in their own due diligence process. The size of the deal has a large effect on the premium; smaller deals demand higher percentage premiums because they are less profitable by demanding a higher marginal rate of resources than larger deals.[32] Any syndication that is required raises the percentage due to increased logistical costs and not being able to solely price the deal.[33] The parties' veracity in its own due diligence of the proposed deal and whether either side retained reputable advisors, which the insurer has access to, informs the insurer of the amount of risk present.[34] The severability of warranties and scope of coverage of known risks for specific indemnities, especially around tax liabilities, the physical location, governing law, and industry sector will all go into the insurer's determination on how they can most effectively de-risk their portfolio of policies.[35] The insurer is in a unique position to price this risk in the form of a premium and is one of the driving factors to utilize W&I insurance. The level of deductible is another key driver in this cost formula for the insurance company. There has been an emergence of policies following the traditional insurance model, which only pays within a certain range—above the deductible and below the cap—but

26. Brown, *supra* note 2.
27. Broke et al., *supra* note 10.
28. *Id.*
29. *Id.*
30. Lips, *supra* note 11.
31. *Id.*
32. Humphrey, *supra* note 16.
33. *Id.*
34. *Id.*
35. *Id.*

there are some policies that kick in immediately and have very large, if any, caps on payouts. The more exposure the insurance company has, the more expensive the policy becomes. The purchaser of the policy is highly incentivized to consider the liability of their warrants and indemnities to determine at what point their W&I insurance policy will be triggered.

Benefits of W&I Insurance

Why would a buyer or seller resort to a costly add-on to an already expensive endeavor? Premiums for these insurance policies are high even though there has been a downward price trend as discussed in Part B. Companies by-and-large make rational decisions when it comes to both purchasing insurance packages and conducting thorough cost-benefit analysis when approaching a potential acquisition. As W&I insurance continues to become more normal for cross-border M&A deals, the reasons for purchasing such policies will likely increase. But at the moment, there are nine reasons to acquire these policies that cover the vast majority of deals being done today.

First, pricing of the risk is extremely difficult; the only way for buyers to adequately price the risk is to have a large portfolio of similar deals in order to be able to spread the risk and price it, which is not feasible.[36] However, all insurance companies' entire business models are based on this principal of both pricing risk and spreading it over enough transactions to make it economically feasible.

Second, the "clean exit" is popular among financial institutions including private equity firms, venture capitalist firms, and investment banks. The primary goal of these investors and institutions is to put their money to work, and if a portion of the sale is held in a retention or escrow account, the money is not gaining a return. Without any threat of liability the institution can fully deploy the proceeds from the sale to a new investment.[37]

Third, insurance packages can bridge the gap between the buyer and seller when they disagree with the level and scope of the W&I's in the agreement. The seller wants the absolute minimum liability with very narrow warranties that have proper limitations and caps the buyer wants broad warranties with no limitations or caps.[38] W&I insurance is an acceptable solution to this gap when the seller and buyer

36. Hoffman & Gerber, *supra* note 7.
37. Humphrey, *supra* note 16.
38. *Id.*

cannot agree on these highly contested terms, especially when the gap might kill the deal.[39]

Fourth, sellers do not always have the backing or credit to cover possible breaches to the warranties and indemnities in a given agreement moving forward. A company might be in the position to sell and cover potential liabilities for a shorter term than is specified in the agreement. W&I insurance can prevent the need for staged payments of holding funds in escrow for extending periods of time.[40]

Fifth, including a W&I insurance package provides an extra incentive that will make a particular bid more attractive in a competitive bidding situation. The buyer can offer lower caps and more limitations on warranties because they will be providing W&I insurance,[41] not including paying for the premium instead of potentially splitting the cost with the seller. The potential for being the only bidder offering W&I insurance in the tender proposal could make the difference in closing or not, because it is not commonplace. An interview with an Australian partner at Baker & McKenzie revealed how W&I insurance saved several deals they were involved in for this reason.[42]

Sixth, an unusual application of W&I insurance would be to protect either individual or family assets. Purchasing W&I insurance would put an additional barrier between individual assets and potential liability through a claw-back or litigation.[43] Although there are adequate protections in most jurisdictions to protect personal and family assets, W&I insurance provides a layer for cross-border transactions.[44]

Seventh, in situations where it is important for the buyer to retain a good relationship with the seller, i.e. employing key members of staff or continuing operations, it is useful to go after a third party for any breaches instead of the seller directly.[45] A similar sentiment exists with seller-side policies if the seller wants to attract a buyer who does not want to insure the warrantor, with buyers who are potential strategic partners post-closing, or with avoiding the possibility of suing mul-

39. *Id.*

40. Furphy et al., *supra* note 6.

41. Humphrey, *supra* note 16.

42. Jannan Crozier, David Allen & Brian Hendry, *Warranty and indemnity insurance: A global reach*, Baker & McKenzie (Aug. 2013), http://docplayer.net/16510505-Warranty-and-indemnity-insurance.html [https://perma.cc/E48Q-L5TY].

43. Humphrey, *supra* note 16.

44. *See generally*, Brown, *supra* note 2.

45. Humphrey, *supra* note 16.

tiple warrantors across jurisdictions if the deal involves multiple jurisdictions.[46]

Eighth, in rare situations, W&I insurance is used in distressed sales. Administrators and receivers of the distressed assets who are not in the position to utilize warranties on the assets being sold can take solace in some protection of one of these policies. The tolerance for these policies from insurers is low due to the nature of the assets and only occur when strict due diligence has been satisfied.[47]

W&I insurance can be utilized to incentivize deals, speed up deals, or as a strategic tool to uphold good relations. The choice to purchase W&I insurance is deal specific and has not, as of yet, become table stakes for large cross-border deals. However, as the insurance companies increase their activity and offerings in the space, the barriers will continue to decrease and the reasons to purchase these packages will increase.

Barriers to the Rapid Expansion of W&I Insurance

One complaint M&A lawyers always have is that their clients want everything done yesterday, if not sooner. Clients may have concerns about delaying the close of a deal in order to procure W&I insurance but the time this takes has reduced dramatically from its start. The insurers need to review the transaction, all of the due diligence documents, reports from experts and conduct their own diligence, which may spur additional questions for either party that were not covered in the parties' diligence. The time between when a broker is contacted and all of these tasks have been accomplished is now two to three weeks.[48] Parties must be careful that no gaps between the policy and the Share Purchase Agreement arise if there are changes to the W&I's,[49] which slows the process down even more after an insurance company is identified and a policy has been written.

Part II: The History and Conceptual Rise of Moral Hazard

The term "moral hazard" dates back to the seventeenth-century and has been discussed and utilized in the evolution of economics, insurance, finance, and behavioral psychology.[50] "Generally, a moral

46. Broke et al., *supra* note 10.
47. *Id.*
48. *Id.*
49. *Id.*
50. Allard E. Dembe & Leslie I. Boden, *Moral Hazard: A Question of Morality*, 10(3) NEW SOLUTIONS 257, 257–79 (2000).

hazard is the prospect that a party insulated from risk may behave differently from the way it would behave if it were fully exposed to the risk. This is because the protected party can act in bad faith without any negative consequences, and might do so if it is in his best interest."[51] We all have experience with this idea from our own childhoods. Children closely being watched by their parents act differently than they do when they are not being supervised. My childhood friend's mother used to say, "One boy has one brain, two boys together have half a brain, three boys together have a third of a brain and four boys together have less brain power than a squirrel." Removing the obvious bias against young boys, her saying was quite insightful to the concept of moral hazard. "[I]f you cushion the consequences of bad behavior, then you encourage that bad behavior."[52] The insurance industry is acutely aware of this issue and brought the term into mainstream in the nineteenth-century.[53]

Adolphe Quetelet and other "moral scientists" applied probability theory to vital statistics like births, marriages, and suicides and thereby proved the great intuition of marine insurance: The risks of an uncertain future event could, like the odds of Hazard, be predicted in the aggregate with sufficient certainty to enable the accurate collection of money today for the costs of tomorrow.[54]

Initially, insurance companies were concerned about insured parties making decisions that would increase the likelihood that insured property (notably houses and factories) would be destroyed and they would have to pay out on those policies at a higher than expected rate.[55] Modern insurance companies continue to worry about this issue but, due to the expansion of coverage, now have to focus on much more than physical property.

51. Kabir Masson, PARADOX OF PRESUMPTIONS: SELLER WARRANTIES AND RELIANCE WAIVERS IN COMMERCIAL CONTRACTS, 109 COLUM. L. REV. 503, 530 (2009) (citing, *see generally*, Mark Geistfeld, Manufacturer Moral Hazard and the Tort-Contract Issue in Products Liability, 15 INT'L REV. L. & ECON. 241, 252–53 (1995)).

52. Tom Baker, *On The Genealogy of Moral Hazard*, 75 Tex. L. Rev. 237, 238 (1996).

53. *Id.* at 240.

54. *Id.* at 247.

55. Eric D. Beal, *Posner and Moral Hazard*, 7 CONN. INS. L.J. 81, 90 ("As both insurers and economists recognize, moral hazard may take many forms: (1) the insured may intentionally cause a loss; (2) the insured may take less care to avoid a loss (which sounds like negligence); (3) the insured may intentionally increase the amount of the loss; and (4) the insured may not take precautions to lessen the amount of a loss.").

Part III: The 2008 Financial Crisis

The financial crisis has been the subject of many articles and continues to be studied heavily. The magnitude and breadth of the subprime mortgage crisis was to many a complete surprise and to others simply the inevitable conclusion to a mounting problem. The main players in the subprime mortgage crisis were gigantic global financial companies. "Seventeen financial conglomerates accounted for at least half of the $1.1 trillion in global losses cited by the world's financial institutions."[56] With companies this large it is in incredibly hard to keep track of the risk different departments are taking.

As a firm gets very large, its management may struggle to keep track of all the firm's activities. "One company division (such as mortgage-backed securitization) might undertake huge amounts of risk, risk the CEO cannot fully understand or appreciate, which would not exist in a small firm with a simple borrowing and lending model."[57]

These firms were making big bets on the housing market and then were able to mitigate their risk by reselling the securities to other investors. There can be little question that the heads of these firms knew exactly what they were doing, however, the extent of the problem went beyond single firms to reach a systemic problem.

The Structure of the Problem

The factors that contributed to the meltdown are beyond the scope of this Comment, but I will provide a brief overview. "Though the methods were complicated, the underlying profit plan was simple: Borrow a large amount of money to make big bets on the subprime mortgage-backed securities market."[58] Subprime loans are loans to borrowers that do not qualify for the lowest, or "prime" interest rates, because of high loan-to-value ratios, or other risk factors.[59] Freddie Mac and Fannie May, among others, would make these loans to individuals with high risk and then pool these loans together and sell them in groups to investors, a process known as securitization. Securitization happens regularly with credit card loans, auto loans and other forms of debt; when mortgages are the underlying asset then the se-

56. Elisa S. Kao, *Moral Hazard During the Savings and Loan Crisis and the Financial Crisis of 2008-09: Implications for Reform and the Regulation of Systemic Risk Through Disincentive Structures to Manage Firm Size and Interconnectedness*, 67 N.Y.U. Ann. Surv. Am. L. 817, 824 (2012).

57. Ludwig B. Chincarini, The Crisis of Crowding: Quant Copycats, Ugly Models, and the New Crash Normal 111 (Bloomberg Press 2012).

58. *Id.* at 125.

59. *See generally id.*

curity is known as a mortgage-backed security, which was the main trigger of the financial crisis. An investor in one of these securities enjoys a proportional share of the income generated by the pool of underlying interest and principal payments.[60] There are two forms of risk that the commercial banks take on—credit risk and interest rate risk.

Freddie and Fannie's risk comes in two forms. They assume all credit risk—the risk that mortgage holders will default on a loan—attached to the securitized mortgages they sell to investors. To reduce some of this credit risk, Freddie buys insurance on some portion of its mortgage pools. Investors, on the other hand, assume interest-rate risk—the risk that interest rates will rise and a set of pooled mortgages will become less valuable, or that interest rates will fall and home owners will prepay their mortgages. Freddie and Fannie also assume a second risk, one with respect to the mortgages that they retain. Because they own these mortgages, they assume credit risk for this retained mortgage group. Because they borrow in order to buy and retain mortgages, they also assume the associated interest-rate risk. Of the two, interest-rate risk is typically far more prolific, and Fannie and Freddie enter into large hedging transactions to mitigate it.[61]

One of the problems that arose was that there was no sufficient way for investors to mitigate either of these risks; at least not to the extent the commercial banks were able too.

The investment and commercial banks also purchased a mortgage pool from another bank, combined it with their own, and split them into several investment vehicles all with different bond ratings. The bond ratings were supposed to represent the likelihood the underlying mortgage holders would pay back their loans and signals the level of risk to the investors. However, after multiple transactions and reorganizations of these mortgage pools, the ratings were not accurately representing the level of risk included in particular pools.[62] Not only did the ratings misrepresent the default risk of the underlying mortgage, but also the investment banks structured these pools so they would receive a higher rating than they should have. "The most important aspect of the CDO[63] structure is that through subordination of cash flows, the sponsor is able to produce a security and has a higher credit rating than the average credit rating of the underlying

60. *Id.* at 160.
61. *Id.* at 159.
62. *Id.* at 271.
63. *Id.* at 161 (a CDO is a collateralized debt option).

assets in the CDO pool."[64] Not only did the banks sell securities that did not carry the appropriate ratings, but they also bet the government would step in if it started to tumble.

Too Big To Fail Or Let The Mighty Fall?

> *"Too big to fail" describes a government's policy of awarding discretionary support to a firm's uninsured creditors out of concern that allowing the firm's failure would have disastrous impact on the financial system as a whole. As such, TBTF firms are more likely to take excessive risks due to their confidence of government intervention in the event of near-insolvency."*[65]

No one can pinpoint where this belief originated from but the explicit guarantee of government-backed deposit insurance likely lead to the notion of an implicit promise to bailout the banking industry as a whole.[66] The implicit promise caused a moral hazard issue before the dominos started to fall. Banks took more risks because they believed the government would not let them fail, and they were correct. The US government stepped in and prevented the crisis from spreading even further than it did but the question is now what will happen next time? "The risk of moral hazard increases when governments consistently intervene to support distressed financial institutions, thus solidifying expectations of such intervention in times of financial upheaval."[67] We have established a system where those who take risks are not held responsible when the other shoe drops.

Part IV: W&I Insurance compared to the Financial Crisis

W&I insurance will never be a huge market; there are simply not enough large-scale deals to support it. It will not be another mortgage-backed security crisis, but it is a market that flies in the face of what we should have learned in the financial crisis—the consequences of risks should be borne by those who take them and not by someone else.

Moral Hazard Created by the Insurance Companies

Insurance companies over the last couple of centuries have become excellent at weighing and pricing risk. Not only is this obvious with the proliferation of different types and widespread use of insurance but also because if they were not good at it, they would never be

64. Bryan J.M. Quinn, *The Failure of Private Ordering and the Financial Crisis of 2008*, 5 N.Y.U. J.L. & Bus. 549, 571 (2009).

65. Kao, *supra* note 56 at 823.

66. *See generally id.*

67. *Id.* at 824.

profitable. They constantly make bets that what the insured party is scared of will not happen. In 2011, there were $4.1 trillion of premiums paid to insurance companies worldwide.[68] It is simply a game of statistics for the insurance companies. The premiums they charge will cover only a fraction of insurance claims made against those policies. However, they are ways of further reducing the risk of these outstanding polices besides simply relying on the underlying statistics.

Securitization of Insurance Policies

Securitization, as discussed in Part III,[69] is when an illiquid asset is transformed into a trade-able security.[70] Securitization has become commonplace,[71] but it has not taken hold in the insurance market in proportion to the size of the insurance market.[72]

The global insurance market is estimated to have earned $4.1 trillion in written premiums in 2011, $170 billion of which were funneled into reinsurance.[73] However, the value of annual issuances of insurance securitizations was $15.5 billion dollars in 2007, a mere fraction of the available market, and issuances dropped to $4.1 billion in the 2008 recession.[74] For comparison, of the $10.3 trillion U.S. mortgage market, about two-thirds of the value is securitized; credit card, auto, and student loans are also securitized en masse, providing liquidity and diversification to investors.[75]

Insurance linked securities had a brief expansion but was hampered by the 2008 financial crisis and has not recovered substantially. Now there are only a couple regularly securitized policies, one of which is a catastrophe bond.[76] Catastrophe bond policies cover natural disasters and are very risky but offer a high return for investors that can stomach the risk.

> CAT bonds are a derived necessity for an insurance and reinsurance industry with limited resources to absorb potentially insurmountable losses in the face of 'the big one,' which would be

68. Harvey Powers, *Insurance Securitization: A Ripe Market?* CPCU Society Journal, (Nov. 2012), https://www.cpcusociety.org/sites/dev.aicpcu.org/files/imported/CPCUeJournalNov12Art1_0.pdf [https://perma.cc/E9KG-4XUZ].

69. *See supra* Part III.

70. Ludwig Chincarini, The Crisis of Crowding: Quant Copycats, Ugly Models, and the New Crash Normal, (Bloomberg Press, 2012).

71. Powers, *supra* note 68.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

> comparable to the 1906 San Francisco earthquake-leveling a major city and resulting in tens, if not hundreds, of billions of dollars in insurance claims.[77]

Catastrophe bonds are also unrelated to financial markets and so they are not tied to the typical swings that investors are used to in the market, further diversifying their portfolio.

Embedded value securitizations are the other common insurance backed security and are the most likely candidate to provide a secondary market for W&I insurance. "Part of the difficulty in managing an insurance company's balance sheet is that it can be difficult to realize the full value of the expected profits that are locked into current policies."[78] These securities offer the same benefits as W&I insurance—they enable the insurance company to enjoy a "clean exit" on its outstanding policy obligations. It is ironic that there is a method through securitization that offers similar benefits that the insurance company is providing companies through W&I insurance. If insurance companies begin to utilize this option more and more, it starts to look eerily similar to the 2008 financial crisis because CDO's with investors holding a majority of the risk for the underlying policies will be very difficult if not impossible to understand.

Insuring the Insurance Companies

Reinsurance is when an insurance company seeks an insurance policy from another insurer to help distribute some of the larger risks.[79] This happens in one of two ways: facultative reinsurance or treaty reinsurance. Facultative reinsurance is done on a case-by-case basis and helps smaller insurance companies facilitate more business because they can pass on the larger liabilities to insurance companies with larger balance sheets and thus more room to absorb risk.[80] However, since it is done on a case-by-case basis, it can be slow to form these agreements and the original insurer does not know if they will be able to retain a reinsurance policy. Treaty reinsurance is when there is a standing contract between the two companies to reinsure some of the risk away from the original company.[81] Typically, these treaties cover a specific class of policies that the original insurer will

77. *Id.*
78. *Id.*
79. Pooja Dave, *When Things Go Awry, Insurers Get Reinsured*, INVESTOPEDIA (2009), http://www.investopedia.com/articles/pf/08/reinsurance.asp [https://perma.cc/LKG3-6AL4].
80. *Id.*
81. *Id.*

reinsure with the secondary insurance company. "Treaty reinsurance automatically passes the risk to the reinsurer for all policies that are covered by the treaty, not just one particular policy. Treaty policies are more general than facultative policies because the reinsurance decision is based on general potential liability rather than on a specific enumerated risk."[82] The general nature of these policies also causes them to be more expensive because the reinsurer is taking on risk automatically.[83] However, it offers stability for the smaller insurance company to underwrite those policies, which fall under the treaty.

The issue with both of these types of reinsurance is that another insurance company is removing all or a percentage of the liability, which creates the potential for moral hazard. If the original insurance companies are able to form a treaty reinsurance relationship with a larger or comparable size company, then they are more likely to underwrite policies. This issue is especially present when the policy is complicated and requires arduous due diligence.

The insurance company might not underwrite a policy that is on the border of their criteria if they were shouldering all of the liability for the duration of the policy, particularly if the policy has a long term, which means they will not be able to utilize those profits in case of a triggering event. However, if they are able to either reinsure this borderline policy through a standing treaty or group these borderline policies together and securitize them, they are more likely to write these polices. It will be very difficult in either of those situations to know the level of due diligence and truly understand the risk involved in the underlying acquisition or potential residual liability that could arise from either the buyer or seller. The reinsurer or investor would have to obtain access to the original stock purchase agreement and due diligence documentation and review them, which would simply not make sense for them to go through with the level of detail needed to understand the potential liabilities because there would be less risky investments available to them. However, it is incumbent upon the original W&I insurance underwriter to seek out these alternative investments and risk mitigation strategies to maximize their flexibility and profits while handling these deals. We come to another scenario where the ultimate holder of the liability is not the initial party.

82. *Id.*
83. *Id.*

Moral Hazard Created by the Insured Party

When a buyer or a seller purchases W&I insurance for any of the reasons discussed in Part I, they are paying the insurer to take on the risk instead of bearing it themselves. The potential problem is the uncertainty over their incentive to identify all of the risks. There is still incentive to perform due diligence throughout the process, but if the insured parties are rational actors, then they will know if they do not identify a risk and there is no consequence,[84] there is little motivation to exert more effort than necessary to meet the minimum requirements of the insurer. The insurance company is then in the position of setting the due diligence guidelines for acquiring companies, which is not the role of the insurance industry. Insurance companies are very good at spreading risk and pricing that risk in the form of premiums[85] but they are not M&A experts nor are they experienced legal counsel that can help structure how these deals are done.

The international M&A market is expanding and the pressure to quickly close deals is mounting.[86] Whether it is a private equity firm or a technology company acquiring another company, the time pressure is always present in these deals. An interesting situation is set to arise when a client puts time pressure on their law firm to finish the due diligence and the firm has expertise in W&I insurance: will they be more likely to recommend the insurance policy when they are aware of potential gaps in the due diligence review? This is an open question and it cannot be answered until these policies have been around for a longer period of time to develop meaningful results. It will be interesting to note how many of these policies were triggered, the insurance company's sources of referral, and if there is a greater acquisition rate where the law firm was the common thread.

84. Eric D. Beal, *Posner and Moral Hazard*, 7 CONN. INS. L.J. 81, 90 (2000) ("According to Posner, the moral hazard problem arises when a party is "insured" against a risk "that he could have prevented at a reasonable cost." But this analysis of moral hazard might go one step further: If party X, through legal actions, is able to externalize its risk (the loss it faces if the risk occurs) onto party Y, then Party X rationally would conclude that it could spend less on preventing the risk from materializing (even though it is the least cost risk avoider). In other words, undesirable incentives are created if a party that could have done something to avoid or minimize the loss is let off the hook . . .").

85. Broke et al., *supra* note 10.

86. Furphy et al., *supra* note 6.

Moral Hazard Created by the Government

"There are market failures and there are government failures,"[87] as my economics professor liked to say. In the 2008 crisis, the government rectified a market failure and replaced it with a moral hazard problem for which we still seek an answer.

The decision to bail out Bear Stearns established an implicit government guarantee of other large financial institutions and their creditors, creating a moral hazard problem. In September of the same year, the Federal Reserve Bank refused to rescue Lehman Brothers, which led to that investment bank's bankruptcy filing and financial turmoil across the globe. Allowing Lehman to fail, though reducing moral hazard, generated uncertainty over regulatory policy that worsened the financial crisis and destabilized markets.[88]

The bailout of Bear Stearns and other investment banks created the rational feeling that the government would continue to bailout major banks if they became insolvent. We learned that assumption was false when Lehman Brothers was forced to declare bankruptcy. After the dust settled, we did not know what the government would do in a situation involving systematic risk until 2009 when the government again bailed out another major US industry sector. In 2009, the government launched an $80 billion bailout of General Motors, Chrysler, Ally Financial, and Chrysler Financial.[89] It appears as though when major financial or integral industries are threatened with a systemic collapse, the government will step in at least the first time to prevent losses. An important question becomes what is the consequence or lack thereof for new industry sectors who have now learned that the government will be there, providing a safety net and creating moral hazard.

87. Clifford Winston, *Government Failure vs. Market Failure: Microeconomics Policy Research and Government Performance*, BROOKINGS INSTITUTE (Sept., 2006), http://www.brookings.edu/research/papers/2006/09/monetarypolicy-winston [https://perma.cc/KZ5Z-6LBX]. *Government* failure, then, arises when government has created inefficiencies because it should not have intervened in the first place or when it could have solved a given problem or set of problems more efficiently, that is, by generating greater net benefits. In other words, the theoretical benchmark of Pareto optimality could be used to assess government performance just as it is used to assess market performance. Of course, the ideal of a completely efficient market is rarely, if ever, observed in practice.

88. Allison M. Hashmall, *After the Fall: A New Framework to Regulate "Too Big to Fail" Non-Bank Financial Institutions*, 85. N.Y.U L. REV. 829, 830 (2010).

89. Brent Snavely, *Final tally: Taxpayers auto bailout loss $9.3B*, USA TODAY (Dec. 30, 2014), http://www.usatoday.com/story/money/cars/2014/12/30/auto-bailout-tarp-gm-chrysler/21061251/ [https://perma.cc/87SG-X5WH].

Conclusion

The insurance industry has been a part of the US economy from its creation. The concept of moral hazard was developed, named, and evolved due to its place and prominence within the insurance industry. It was the first to combine the hazards of statistical risk with the concept of morality.[90] Today, moral hazard has become a household term due to the 2008 financial crisis[91] and the more recent bailout of the US auto industry.[92] It has proven useful to use as a conceptual framework for analyzing systemic economic circumstance, one that we should apply to more situations than we currently do.

Warranties and indemnities rarely touch a majority of peoples' lives, most do not even know what the terms mean, but they are an essential component of contracts, insurance policies, and M&A. They were the first contractual tools to spread risk,[93] and now we have created a secondary insurance market to further dilute the risk from the two contracting parties. M&A insurance is a useful tool, especially in extremely complicated cross-border M&A transactions, with very high stakes and large parties. They will be more likely to execute a risky deal if they are shielded from the risk. Partners at large law firms are commenting on the increased popularity of M&A insurance policies because of these benefits.[94] However, there are still open questions to be answered. Will this increase the rate of insurance claims? Will conflict of interests arise in law firms when they suggest these policies? Will the insurance market pass on these risk obligations to investors at large by leveraging securitization or reinsurance? We do not know what moral hazards will actually emerge out of this new market, but the potential is quite clear.

90. Baker, *supra* note 52.
91. *See supra* Part III.
92. Hashmall, *supra* note 88, at 830.
93. Hanton, *supra* note 1.
94. *See generally* Brown, *supra* note 2; Crozier et al., *supra* note 42.

What's in a "Like"?: The Union Interest in Regulating Social Media Use

By TIARA QUINTANA*

> "It is by the goodness of God that in our country we have those three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence never to practice either of them." – Mark Twain[1]

Introduction

FACEBOOK. TWITTER. YOUTUBE. INSTAGRAM. If you do not use or at least recognize one of these names, welcome to the twenty-first century. If you do use one of these platforms, I do not doubt that you may glance at your phone at least once to check your social media as you read this article. And you are not alone. Projections estimate that over two billion people from around the globe will be using some form of social media by 2016.[2] With approximately one-third of the world's population taking advantage of the various social platforms, social media has clearly become an important part of everyday life. The numerous platforms available to the public have given the individual the ability to more freely communicate to the world, allowing for a social discourse that was previously limited to classrooms, dinner tables, and other small face-to-face conversations. Today, a single person has the ability to celebrate, vent, discuss, or share ideas with an entire social network of friends and strangers, and engage in a free exchange of opinions and ideas. In fact, nearly half of all Facebook

* J.D., University of San Francisco School of Law (2016); B.A., Economics and International Relations, Boston University (2013). The author would like to thank Professor Maria Ontiveros for her inspiration, guidance, and support throughout the writing process for this Comment. Also, many thanks to Samantha Botros and the entire USF Law Review for their hard work in publishing this piece. Lastly, the author would like to thank her family and friends for their endless love and encouragement.

1. MARK TWAIN, FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD 108 (Twain Press, 2011).

2. *Number of social media users worldwide from 2010 to 2018 (in billions)*, STATISTA, http://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/[https://perma.cc/92FM-9F6].

and Twitter users visit the sites daily, transforming social media platforms into the new soapbox of everyday discourse.[3]

Moreover, one single discourse can and has evolved into a tool for organization and change. During the Arab Spring, social media served as a critical tool for spreading the message of freedom and democracy across North Africa and the Middle East.[4] Studies show that during the week prior to Egyptian president Hosni Mubarak's resignation, the total rate of tweets from Egypt and around the globe concerning the political change skyrocketed from 2,300 a day to 230,000.[5] Also in 2012, the KONY[6] video campaign took the West by storm through the use of social media. In just five days, the video publicizing war crimes by Joseph Kony spread across Facebook to capture an astounding 67 million views on YouTube.[7] Regardless of the success or merits of these social campaigns, social networks nevertheless prove to be a powerful tool for creating social awareness of global issues, while also creating a space for the ordinary user to engage in common conversation.

Recognizing the ubiquity of social media, it is not difficult to imagine everyday scenarios where social media may be used as a tool for more harm than good. Improper conduct and misuse has the potential to disrupt and corrupt positive efforts and processes. Consider the following examples of social media usage placed in the context of union activity.

Suppose two members in good standing are running for an officer position to represent the same union in a tight election. Andy is supported by almost half of the union's members, Beth follows closely behind garnering about forty percent of the vote, and the rest of the members remain undecided. Fearing that Andy will win the election, Beth embarks on a campaign to sabotage Andy's reputation. Using the pseudonym Cath, Beth creates a false Facebook account claiming

3. Neil Patel, *Which Social Media Accounts Really Matter and Why*, KISSMETRICS (June, 2014) https://blog.kissmetrics.com/which-social-accounts-matter/ [https://perma.cc/2JXC-78DQ].

4. Catherine O'Donnell, *New study quantifies use of social media in Arab Spring*, UW TODAY (Sept. 12, 2011), http://www.washington.edu/news/2011/09/12/new-study-quantifies-use-of-social-media-in-arab-spring/ [https://perma.cc/XBF6-9Q48].

5. *Id.*

6. INVISIBLE CHILDREN, http://invisiblechildren.com/kony-2012/ (last visited Oct. 20, 2015) [https://perma.cc/EC8C-DUFJ] (describing Invisible Children's effort to bring global attention to and campaign for the capture of war criminal, Joseph Kony).

7. Iman Baghai, *Kony 2012 Shows The Power of Youth And Social Media*, HUFFINGTON POST (Mar. 12, 2012, 2:27 PM), http://www.huffingtonpost.com/iman-baghai/kony-2012-why-i-support-t_b_1339474.html [https://perma.cc/L439-68NP].

to be a former friend and colleague of Andy. Beth uses the account to spread rumors about Andy's past and questions his allegiance to the union, which includes not only written posts but also contains numerous photo-shopped pictures of Andy in a false and unflattering light. Closer to the election she becomes increasingly desperate and goes as far as generating a YouTube video containing slanderous claims about Andy's connections to terrorist organizations. Due to the false nature of the accounts and the inability to verify the true poster, other officials cannot disqualify Beth nor stop the aggressive attacks from continuing.

Next, imagine that Dan, an enraged supporter of Andy, reacts to his candidate's attack by employing his own social media crusade. Instead of targeting Beth, Dan chooses to go after fellow members that do not currently support Andy. Dan begins posting on Facebook that he will personally take measures into his own hands against those who "betray" the union by not electing Andy as a union officer. Frustrated by the lack of response to his Facebook threats, Dan posts a photograph of an anonymous beaten and bloody man on Instagram containing the caption, "Vote for Andy or else . . ." As a result of the social media debauchery and the ensuing anxiety, only members supporting Andy show up to vote, securing him the win.

Now, Andy acts as the elected official of the union. After the hype of the election dies down, things return to normal. Months later, violence ensues in the city regarding recent police behavior towards minorities. Andy, a white man, reacts to the situation by tweeting[8] the following message: "If they don't want to die, they should go back to where they came from!" The following day, many union members refuse to show up to work in response to the offensive tweet, as the message has gone viral within the workplace. When they are forced to return to work or lose their jobs, the outraged members begrudgingly return to work, which quickly culminates in heated tensions and violence between those supporting Andy and those upset with his remarks. As a result, several employees lose their jobs. Meanwhile, Andy continues to antagonize other members on Twitter, re-posting hateful speech and supporting unpopular political members with similar views. In effect, the entire workplace becomes a place of distrust and dysfunction, hurting both the union and the employer.

8. Vangie Beal, *tweet*, WEBOPEDIA, http://www.webopedia.com/TERM/T/tweet.html (last visited Nov. 10, 2015) [https://perma.cc/NC7D-K7Y9].

This Comment seeks to propose guidelines for unions regarding social media conduct of officers, between members, and during elections in which special rules are needed. While the above examples may not play out in exactly the same fashion in the real world, they are not implausible. Thus far, only two unions have implemented their own social media policies for their members,[9] although they do not appear comprehensive enough to shield the union from all potential harm. On the other hand, the majority of unions have yet to promulgate or even explore proper social media guidelines, leaving this area unclear and potentially destructive. In ignoring this essential method of speech, communication, and organization, unions forget their interest in setting forth standards that ensure the protection of members and secure the integrity of fair representation. The previous scenarios demonstrate how social media changes the dynamic of a collaborative environment to one of deceit, animosity, and mistrust, and why unions must not compromise their integrity by turning a blind eye to this reality. Because labor unions play an imperative role in protecting employees and creating the best workplace conditions, attention must be paid to this area of ever-growing importance.

This Comment is organized in three sections. Part I will discuss the current landscape of social media in the workplace as a means of background rather than as a primary point of contention. Within this discussion, I will address the relationship between the cyber world and free speech and how the workplace has responded, confronted by the dichotomy of an employee's lack of privacy and her protected, work-related conduct. Part II will describe the primary interests unions have in regulating union officers' conduct with respect to their duties; instruct members on permissible conduct in relation to one another and the union; and prescribe ideal rules and regulations for ensuring fair and representative elections take place. In order to demonstrate why these interests are important and when issues may arise, I will refer back to the introductory hypotheticals to better analyze and discuss these points. Finally, in Part III I will propose how unions should regulate social media behavior by officers and members alike, as well as establish the best guidelines for social media use during elections.

9. *See generally CWA Social Media Policy Guidelines*, CWA, http://www.cwa-union.org/pages/cwa_social_media_policy_guidelines (last visited Sept. 20, 2015) [https://perma.cc/82S3-RAJP] (outlining guidelines for members of the Communications Workers of America regarding the use of social media); *see also Social Media Guide*, IATSE, http://www.iatse.net/member-resources/social-media-guide (last visited Sept. 28, 2015) [https://perma.cc/HEX2-7SAS] (defining the social media policies and advice for members of the International Alliance of Theatrical Stage Employees).

This section seeks to strike the proper balance between broad and narrow provisions that will enable implementation while avoiding being too narrow for employers to use against employees. Overall, this Comment strives to analyze this unaddressed problem from the perspective of a union wishing to regulate the unchartered area of social media.

I. Social Media and the Workplace: The Current Landscape of Regulation

Before all other rights, some consider the First Amendment[10] the most precious. The First Amendment guarantees each citizen of the United States the right to speak freely, to associate with whomever he or she chooses, and to assemble.[11] I will re-examine this right in the context of the cyber world, where communication occurs instantaneously to a massive audience with few costs. While most users do not question or consider their exercise of free speech in this new cyber landscape, employers have had to consider how to monitor this new vehicle of expression. The following section discusses the interaction between the First Amendment and cyberspace, analyzes how the workplace has reacted in regulating this new-found form of expression, and highlights the manner in which employees may freely exercise this right under the current legal landscape. Understanding how employees use social media and the underlying concerns from both a practical and an employer perspective will help demonstrate why unions have an interest in creating guidelines that advance member protections and union harmonization.

A. Free Speech and Cyberspace

Communication and free speech in the twenty-first century have changed drastically from what the forefathers imagined when drafting the Bill of Rights. Today, social media allows an individual to opine on everyday occurrences and personal sentiments to an entire network of followers from around the globe. Social media encompasses a broad audience of users, as 35 global heads of state, every U.S. cabinet agency, every major U.S. candidate for President, and more than 40% of top global religious leaders partake in some form of social plat-

10. U.S. CONST. amend. I.

11. *Id.*

form.[12] Users not only utilize social media for personal opinions, but social media has become an effective way to garner attention to important events. In fact, 27.8% of Americans obtain their news from social media sites, ranking just below newspapers but above radio and other print sources.[13]

While it may appear to be a luxury to express one's self to thousands with the click of a button or a hashtag, many dangers do exist. For example, social media decreases personal accountability through the ease of access and option for anonymity (or pseudonymity) online.[14] Social media also dawned the concept of "trolling," in which individual persons enter into online conversations and post comments designed to disrupt or upset the conversation.[15] Making matters worse, trolling, hate speech, and online harassment disparately impact women, as a study from 2000-2012 reported that 72.5% of online harassment targeted females.[16] Notwithstanding these dangers, the First Amendment has taken on more fervor in the cyber world, for better or worse.

Because Americans hold speech so sacred, there are few ways to limit what an individual can say or post on social media. The tort of defamation still exists in cyberspace when a false statement of fact is circulated that harms another's reputation.[17] The law also seeks to punish Internet speech seen as posing a "true threat,"[18] which is often difficult to distinguish given the ambiguity and lack of context encountered in cyber exchanges. The difficulty is best demonstrated by

12. *Are Social Network Sites Good for Our Society*, PROCON.ORG, http://socialnetworking.procon.org (last updated July 13, 2016) [https://perma.cc/4R9T-Q55D].

13. *Id.*

14. *See* Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 752 S.E.2d 554 (2014) [https://perma.cc/2JXC-78DQ] (describing a case in which anonymous Yelp users were forced to disclose their identity due to the disparaging nature of their reviews and possibility of false identity).

15. Jennifer Golbeck, *Internet Trolls Are Narcissists, Psychopaths, and Sadists*, PSYCHOLOGY TODAY (Sept. 18, 2014), https://www.psychologytoday.com/blog/your-online-secrets/201409/internet-trolls-are-narcissists-psychopaths-and-sadists [https://perma.cc/8A5W-2ASA].

16. Tom Watson, *Stifling Women's Online Speech With Sexual Harassment: Why It Matters To Social Change Movements*, FORBES (Jan. 20, 2014), http://www.forbes.com/sites/tomwatson/2014/01/20/stifling-womens-online-speech-with-sexual-harassment-why-it-matters-to-social-change-movements/[https://perma.cc/7NDP-FM5Y].

17. *See* Dow Jones & Co., Inc. v. Gutnick, (2002) 56 CLR 575. The court in *Gutnick*, the Australian High Court, was challenged with determining under which law would govern, as the Wall Street Journal was charged with publishing the information via New Jersey servers, but the material was downloaded and harm created in Victoria, Australia. *Id.* at 59. This further demonstrates how the cyberspace complicates traditional legal principles.

18. *See* Elonis v. United States, 135 S. Ct. 2001, 2007 (2015).

Elonis v. United States.[19] In *Elonis*, the accused posted several explicit messages in the form of rap lyrics on Facebook.[20] The posts described Mr. Elonis's "sinister plans" for his co-workers, alluded to attacking an elementary school, and ranted about killing his wife.[21] The Supreme Court decided that the requisite mental state, viewed subjectively from the point of view of the poster, could not be satisfied to find a true threat.[22] Nonconsensual pornography, the distribution of sexually explicit images without the consent of the victim,[23] was similarly difficult to penalize due to lack of recourse in a legal world not suited for the problem.[24] However, many states have responded by creating their own laws to punish the malicious practice.[25] Although the law attempts to prevent certain behavior, the First Amendment remains alive and well in cyberspace.

B. The Workplace Reaction

In the interest of company efficiency, the workplace, in general, has had to learn to regulate employees' interaction with the cyber world. As social media replaces face-to-face conversations with a public forum, personal and private affairs become exposed to wanted and unwanted attention. Thus, employers have been confronted with how to monitor and regulate employees' use of social media as it affects business, reputation, bargaining, and productivity. While not the focus of this Comment, employers have well-established regulations of workplace use of social networking. The NLRB has also opined on what an employer may or may not prohibit. Specifically, the Board advises that employer prohibitions may not be so sweeping that they impede on activity protected by federal law.[26] Insofar as acceptable employer action goes, employee comments on social media that ap-

19. *Id.* at 2004.

20. *Id.* at 2005.

21. *Id.* at 2005–2006.

22. *Id.* at 2022.

23. *What Is Revenge Porn?*, Cyber Civil Rights, http://www.cybercivilrights.org/faqs/ (last visited Nov. 30, 2015) [https://perma.cc/4AUE-6TBV].

24. Maureen O'Connor, *The Crusading Sisterhood of Revenge-Porn Victims*, N.Y. Mag. (Aug. 29, 2013), http://nymag.com/thecut/2013/08/crusading-sisterhood-of-revenge-porn-victims.html# [https://perma.cc/M6NV-26RY].

25. *See* Cal. Civ. Code § 1708 (2015); *see* Fla. Crim. Code § 784.049; *see also 26 States Have Revenge Porn Laws*, End Revenge Porn, http://www.endrevengeporn.org/revenge-porn-laws/ (last visited Nov. 30, 2015) [https://perma.cc/H678-67UZ].

26. *The NLRB and Social Media*, Nat'l Labor Relations Bd., https://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media (last visited Sept. 20, 2015) [https://perma.cc/2RVB-8MCK] (detailing General Counsel and Board decisions on protected and unprotected social media use by private sector employees).

pear as mere gripes without any relation to group activity among other employees are not protected.[27] This section will further discuss employee conduct as it relates to an employee's expectation of privacy, as well as protected online speech in relation to employment conditions. These issues will later be used to guide the parameters of my later proposals.

i. Employer Rights and Employee Expectation of Privacy

Although an employee may be protected in his work-related speech, he does shed other rights at his employer's doors. In particular, an employee loses his right to privacy when he enters the premises of his employment, uses his work-provided cellphone, or logs onto his work computer. Because an employer owns the means of communication that employees use during work hours, there is little argument that there is an expectation of privacy, the pivotal question when it comes to employee privacy rights.

There are few instances where the Board will protect workers' privacy in the workplace. One of those places is during non-work hours, in which workers are free to engage in concerted activity shielded from the eyes and ears of the employer via the Internet.[28] However, an employer is allowed to monitor communications made through work email, but they may not surveil for content.[29] Another area in which employees are granted some protection concerns password-protected social accounts. Some states have moved to prohibit an employer from requiring present and prospective employees to hand over the passwords of their social media accounts.[30] But if the profile is public, then an employer has every right to scan the content and take action thereafter.[31]

27. *Id.*

28. Purple Communications and Communications Workers of America, 361 N.L.R.B. 43 (Sept. 24, 2014); *see* Dave Jamieson, *Your Boss Can't Stop You from Organizing a Union Over Work Email: Feds*, HUFFINGTON POST (Dec. 11, 2014 2:23 PM), http://www.huffingtonpost.com/2014/12/11/employers-cant-stop-you-from-email_n_6309656.html [https://perma.cc/2DCL-D5MT]; *see also* Time Keeping Systems Inc. and Lawrence Leinweber, 323 N.L.R.B. 30 (1997).

29. Purple Communications and Communications Workers of America, 361 N.L.R.B. 43 (Sept. 24, 2014).

30. Aliah D. Wright, *More States Ban Social Media Snooping*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Oct. 12, 2014), http://www.shrm.org/hrdisciplines/technology/articles/pages/social-media-snooping.aspx [https://perma.cc/VD53-8H9H].

31. *See* Jacob Davidson, *The 7 Social Media Mistakes Most Likely to Cost You a Job*, TIME (Oct. 16, 2014), http://time.com/money/3510967/jobvite-social-media-profiles-job-applicants/ [https://perma.cc/YVU3-NS4B]; *see also* Rachel Ryan, *Yes, Employers Will Check Your Facebook Before Offering You a Job*, HUFFINGTON POST (May 4, 2013), http://www.huf

Therefore, an expectation of privacy for an employee hardly exists in the workplace. The cyber world further conflicts with any sense of privacy, as social media exists to be social rather than private. Although the law grants employers broad rights over online conduct of employees, these limitations help establish the importance of password protections and private profiles going forward.

ii. Protected Employee Activity

Social media can be used in a manner to organize people for a specific cause. For employees, this means that social media can be used to bring employees together to make productive changes to the workplace. Be that as it may, restrictions exist that limit what is and what is not protected. For private employees, the primary focus of this Comment, the First Amendment does not protect them in their speech concerning an employer and workplace conditions. Instead, these employees must turn to another form of law for protection—the National Labor Relations Act.[32] Specifically, workers are protected by Section 7 of the Act, stating that "[e]mployees shall have the right to self-organize, to form, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[33]

In order for employee conduct to fall within the purview of this protection, the activity must be "concerted," the activity must be protected (conducted through permissible means), and the activity must concern the mutual aid or protection (content must be work-related). For example, the NLRB has found policies prohibiting employees from making statements that "damage the Company, [or] defame any individual or damage any person's reputation" violate Section 7 of the NLRA since the policies impede the employees' ability to discuss workplace conditions with one another.[34] Moreover, the Board has held that an employee's act of "liking" a Facebook comment by another employee complaining about wages is considered concerted, protected activity.[35] However, the General Counsel of the NLRB has upheld an employer's policy forbidding employees to communicate

fingtonpost.com/rachel-ryan/hiring-facebook_b_2795047.html [https://perma.cc/B75R-5GRC].

32. 29 U.S.C. §§ 151–169 (2010).

33. 29 U.S.C. § 157 (2010).

34. Costco Wholesale Corp. and United Food and Commercial Workers Union, Local 371, 358 N.L.R.B. 6 (2012).

35. Three D, LLC d/b/a Triple Play Sports Bar and Grille v. National Labor Relations Board, 361 N.L.R.B. 31 (2014).

"about customers . . . in a manner that is vulgar, obscene, threatening, intimidating, harassing, libelous, or discriminatory on the basis of any, as this type of content falls out of the protected zone of conduct . . . ."[36] Thus, it appears that so long as the content is work-related and endorsed by at least one colleague, an employee may use social media as a means to discuss the workplace.

Another instance where cyberspace and protected Section 7 activity collide involves concerted activity with respect to collective bargaining. Recently, the NLRB and its General Counsel amended election rules to allow for electronic signatures for representation elections.[37] Now, unions no longer have to gather employees' signatures on authorization cards before they file a petition with the NLRB.[38] The General Counsel has put forth minimum requirements for electronic signatures and additional changes are likely to come, but the decision to modify representation procedures shows the NLRB's interest in accommodating employees, increasing participation in elections, and advancing elections more quickly.[39] While this protected activity does not directly implicate social media, it nevertheless demonstrates the NLRB's recognition of the manner in which workers operate and communicate in the cyber world.

Accordingly, the law continues to afford employees their most coveted right—the ability to partake in concerted activity. Moving forward, this protection will manifest itself as a key criterion in the union regulation of social media conduct along with highlighting the different ways this protection operates between employees and within the election context.

II. Union Interests in Regulating Social Media

In order for any body or organization to function properly, the unit must work together. However, social media provides the impetus

36. Office of the General Counsel, Division of Operations Management, Report of the Acting General Counsel Concerning Social Media Cases (Jan. 14 2012).

37. Richard F. Griffin, Jr., *Guidance Memorandum on Electronic Signatures to Support a Showing of Interest*, NLRB, MGMT. MEMO (Sept. 1, 2015), *available at* http://www.managementmemo.com/files/2015/09/GC-15_08-Guidance-Memorandum-on-Electronic-Signatures-to-Support-a-Showing-of-Interest.pdf [https://perma.cc/7UR2-CTAR]; Steven M. Swirsky, *Unions Can Now Use Electronic Signatures for Showing of Interest for NLRB Elections*, MGMT. MEMO (Sept., 3, 2015), http://www.managementmemo.com/2015/09/03/unions-can-now-use-electronic-signatures-for-showing-of-interest-for-nlrb-elections/ [https://perma.cc/6BQC-5RLU].

38. Swirsky, *supra* note 37.

39. *See id.*

for disharmony through the effortless dissemination of deceit, hostility, and misinformation. The examples laid out at the beginning of this Comment make the specific problems social media poses for unions evident. In this section, I will discuss in depth how social media can compromise a union leaders' prescribed duties, interfere with union objectives through employee misconduct, and unfairly influence an election. This section also serves to emphasize why unions should take interest in this issue, as the failure to do so may only exacerbate the problem.

A. The Role of Union Leaders

Union officers and stewards play an integral part in the operation of a successful union. Leaders not only build the pillars from which the union stands on, but their influence spreads throughout the entire body to create a cohesive and efficient unit. As demonstrated by the hypotheticals, members also look to officers and stewards as representatives of the union to secure their interests. Hence, the union has a significant interest maintaining honest and accountable leadership, while counterbalancing problems and policies posed by social media.

Union officers are trusted with specific fiduciary duties associated with union funds and management.[40] These duties, similar to those placed on corporate managers, include holding union money and property, refraining from dealing with adverse parties, forgoing personal or pecuniary interests, and accounting for any profits made on behalf of the union.[41] Union stewards, who may also be union officials, work as conduits between the rank-and-file employee members and union officials.[42] Stewards educate employees about their rights under collective bargaining agreements, ensure the proper enforcement of the collective bargaining agreement, and may represent and defend employees if disciplinary action takes place.[43] Due to the nature of officer and steward responsibilities, unions should have a huge interest in the manner in which these persons manage their social

40. *See* 29 U.S.C. § 501 (2012); *see* Pete Lewis, *Fiduciary Duties of Union Officers Under Section 501 of the LMRDA*, 37 LA. L. REV. 875 (1977); *see also Local Officers-Fiduciary Responsibility* COMMC'NS WORKERS OF AM. (2003), *available at* http://www.cwa-union.org/sites/default/files/part_ii_local_officers_1.pdf [https://perma.cc/QVP3-JDDV].

41. 29 U.S.C. § 501 (2013).

42. *Stewards: What is the Role of a Union Steward?*, SOC'Y FOR HUMAN RES. MGMT. (July 23, 2013), http://www.shrm.org/templatestools/hrqa/pages/roleofunionsteward.aspx [http://perma.cc/8PUH-8EY9].

43. *Id.*

media while both in their official capacities and in private—but when does the officer shed his official skin and become just another user?

Social media is an unforgiving beast, making misstatements more likely and even more difficult to take back. The blurred line separating private and personal thoughts from statements made in an official capacity further aggravate this problem for union leaders. Even as a private person, the union leader enters the public sphere when logging into social media networks and her identity as an officer cannot just be forgotten. While the hypothetical situation of an officer making an inflammatory statement regarding race relations exaggerates the issue, it imitates reality in many ways. After the fallout in Ferguson involving the death of an unarmed black teenager at the hands of the police,[44] law enforcement unions were quick to respond, albeit in support of their fellow officers.[45] However, other conduct has not been as well-mannered, as one officer made profane comments on social media calling for a "race war" and a "cleansing."[46] Although the law enforcement officer in that case did not hold an official position within the union, the example displays how personal and private opinions on social media can manifest into public concerns and impact the union as a whole.

With respect to fiduciary duties, social media facilitates the ease of breaches as well. Practically speaking, social media connects people and sometimes that means connecting the wrong people. Tasked with safeguarding union funds and remaining loyal to union interests, union leaders put themselves at risk of being targeted by the public when they participate in social networks. It does not seem far-fetched that nefarious activity could occur between union officials and those averse to the union's interests through the ease and guise of social media. Just as social media has been used for cyber bullying and stalking, it similarly creates a medium for blackmail and extortion.[47] Not only do officials become more accessible to adverse parties, but

44. *See* Larry Buchanan et al., *What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html?_r=0 [https://perma.cc/9UNR-FS64].

45. Kevin Johnson, *Ferguson decision: Reaction from legal, advocacy groups*, USA TODAY (Nov. 25, 2014), http://www.usatoday.com/story/news/nation/2014/11/24/ferguson-grand-jury-decision-justice/70061558/ [https://perma.cc/ZV95-5V8H].

46. *See* Daniel Rothberg, *Detective's offensive posts prompt Metro to adopt new social media policy*, LAS VEGAS SUN (Oct. 20, 2015), http://lasvegassun.com/news/2015/oct/20/detectives-offensive-posts-prompt-metro-adopt-new-/[https://perma.cc/7CR9-XXJJ].

47. Robert Shullich, *Risk Assessment of Social Media*, SANS INST. 24 (Dec. 5, 2011), https://www.sans.org/reading-room/whitepapers/riskmanagement/risk-assessment-social-media-33940 [https://perma.cc/Y2FQ-PWH3].

wrongdoing may also be easily masked by social platforms through the use of pseudonyms and anonymous contacts undetected by the public eye.

On one hand, officers and stewards should not be banned from partaking in social media, whether as public or private individuals. Furthermore, they should have the opportunity to freely express their personal opinions without repercussions from the union. On the other hand, social media increases the risk of fracturing the internal cohesion and solidarity of the organization when a social media misstep occurs. Thus the question remains on how to balance the union's interest with an individual's right to participate in social networking and free speech.

B. Member Conduct

If the officers and stewards are the head, then surely the members are the heart of the union. In essence, the union does not exist without employees to represent. In comparison to union leaders, employees create an entirely different dilemma with respect to social media. Unlike officers who have much to lose by placing themselves in the public eye, employees do not carry that burden. Instead, employees need only concern themselves with not getting fired from what they post—apart from that, they might as well throw caution to the wind.[48]

However, employees are just as likely to improperly use social media in a manner destructive to the cohesion of the union. The scenario presented at the beginning of the Comment shows how regular union members can abuse social media to further their interests. Disagreements and gripes happen regularly on social media, and coworkers are not exempt from this temptation to engage in imprudent discussions. Such conversations have the potential to escalate into serious misconduct and possible violence. As mentioned previously, the law does not forbid threatening behavior on the Internet unless considered a true threat viewed through the subjective lens of the poster.[49] Thus, aggressive and intimidating practices may freely occur without any interference from the law and are shielded from union officials.

48. *See supra* Introduction. Although, employees still must limit their conduct within the purview of the law, as narrow as it may be.

49. *See* Elonis v. United States, 135 S. Ct. 2001 (2015).

Additionally, research shows that between 60% and 80% of all difficulties in organizations are attributed to strained relationships between employees.[50] This gives employers an incentive to resolve disputes before they spiral out of control, but other times it may work to their benefit if it involves a severance of union relationships. Employees disputing with fellow employees may threaten, coerce, defame, or bombard one another with unwanted attacks online. Recently, an employee posted a photograph of a gun on Instagram expressing to his girlfriend the need to blow off some steam after an altercation with a fellow employee.[51] When instances like this occur, union procedures should come into play to mend the break. This can be difficult online due to the scope of the audience, the speed of the delivery, and the possibility of an unknown violator. Nevertheless, a broken union does not function as a union at all.

Members also have the potential to harm the union apart from rupturing member-to-member conduct. Just as employees may use social media to express workplace gripes concerning employers and fellow employees, members may use social platforms to express distaste with the union itself. Take the introductory example. Suppose the "silenced" members opposing Andy took to social media to communicate their feelings towards the union for allowing such a bully into power. Instead of attacking Andy directly, the indignant members take aim at the union, disclosing improper union behavior and false accusations that an employer may be interested in knowing. Under these circumstances, the union not only suffers from an internal disjunction, but the public disclosure challenges the union's continued role as the bargaining representative of the employees in relation to the particular employer.

The scenarios and implications described above recognize the dangers presented to the union when members run amok in the cyber world without restraint. Although member behavior seems less of an issue than that of union leadership, member conduct perhaps creates the most concern for the union since there is little control to be had over the speech of individuals who are acting privately. Unions cannot and should not try to limit members' speech, but there is desperate

50. *Work Place Statistics - The cost of turnover, loss of productivity and absenteeism*, CONFLICT IN WORKPLACE (July 31, 2011), http://conflictinworkplace.com/2011/07/31/work-place-statistics-the-cost-of-turnover-loss-of-productivity-and-absenteeism/ [https://perma.cc/HVC7-EBAC].

51. Pugh v. UAW-Chrysler Dept., UAW, Public Review Board Int'l Union Case No. 1719 (Dec. 2015), *available at* http://www.uawpublicreviewboard.com/wp-content/uploads/_post_pdf/1370-2a5a2c69.pdf [https://perma.cc/EK9Q-DKCK].

need for some type of parameter when union and member objectives are on the line.

C. The Election Conundrum

For everyday Americans, the importance of securing a fair and representative election seems obvious. After all, nobody wants another *Bush v.* Gore[52] situation, not even on a smaller scale. Although the Labor-Management Reporting and Disclosure Act (LMRDA)[53] enumerates provisions for holding elections, they remain relatively loose.[54] Most unions have internal procedures regarding elections, but they have yet to include policies concerning member and officer conduct in relation to social media. Accordingly, this is another question that remains unanswered but is critical for unions to address.

The election hypothetical framing the Comment points to the gravity elections have on the entire functionality of the union. Because of the gravity of the decision, elections gain attention and incite passion from all of those involved. Not only are candidates ardent on winning, supporters approach election with equal if not greater fervor. With emotions already at their peak, social media intensifies those feelings tenfold. Statistics show that 66% of social media users have used social platforms to engage in political activities, including promoting material related to political issues.[55]

While many individuals use social media for positive political endorsements, the introductory election example exposes the natural abuses connected with social media in the election context. In fact, the Islamist militant group ISIS[56] uses various social media platforms to further its political objectives and propagate fear around the world.[57] Although everyday individuals would not go as far, candidates and members may still engage in undesirable social media conduct that could otherwise affect the outcome of an election. Candidates may employ smear campaigns against one another and members

52. 531 U.S. 98 (2000).

53. 29 U.S.C. §§ 401–531 (2012).

54. *Id.*

55. *Politics Fact Sheet*, Pew Research Ctr., http://www.pewinternet.org/fact-sheets/politics-fact-sheet/ (last visited Nov. 30, 2015) [https://perma.cc/D3VA-G9AZ].

56. Nick Thompson et al., *ISIS: Everything you need to know about the rise of the militant group*, CNN (Feb. 10, 2015), http://www.cnn.com/2015/01/14/world/isis-everything-you-need-to-know/ [https://perma.cc/5E28-D57K].

57. *See* Julia Greenberg, *Why Facebook and Twitter Can't Just Wipe Out ISIS Online*, Wired (Nov. 21, 2015), http://www.wired.com/2015/11/facebook-and-twitter-face-tough-choices-as-isis-exploits-social-media/ [https://perma.cc/RP3C-3Y22].

could be tempted to threaten one another for intimidation purposes. Without any type of regulation, unions can expect coercive, defamatory, inciting, and other unwanted behavior from members and officers that interfere with the integrity of union representation and fracture the fellowship of the unit.

Unlike previous speech concerns, elections create a unique situation where political speech and the free flow of information should prosper. Subsequently, the election situation puts the union between a rock and a hard place with regard to regulating speech via social media. To demonstrate just how far reaching political speech has been stretched, the United States decided in 1976 that money was a form of speech in connection to political endeavors.[58] That holding carried over in *Citizens United v. Federal Election Commission*[59] when the Supreme Court expanded this concept by announcing that corporations will be treated as persons with the full extent of rights, including speaking on behalf of the entire entity.[60] Although these examples are not analogous to the exact problem encountered here, these examples demonstrate the broad protections given to politically motivated speech.

When applied to union elections, the same broad protections for political speech still prevail. During a union election, the appointee for one of the candidates took to Twitter to harass an opponent, in which remarks were not only aimed at the candidate herself but also at her daughter.[61] Despite the aggressive tone of the tweets and the candidate's argument that the messages impeded her ability to campaign in a safe environment, the Board did not find in her favor.[62] Instead, the Board concluded that the conduct did not rise to the level of "sufficiently repugnant to democratic principles to require a new election."[63] This case demonstrates the tremendous and unclear threshold that must be met to silence or limit political speech. Although this area remains so well protected and no clear standards have been articulated, unions have remained absolutely silent in directing officers and members in this regard, despite their overwhelming interest in ensuring a fair election.

58. Buckley v. Valeo, 424 U.S. 1 (1976).

59. 558 U.S. 310, 312 (2010).

60. *Id.*

61. Donovan v. Local Union 2000, UAW Case NO. 1721, UAW, Public Review Board Int'l Union Case No. 1721 (Sept. 28, 2015).

62. *Id.* at 15.

63. *Id.* at 18.

The special case of elections comports with the fundamental rights held most sacred to U.S. citizens. Attempting to prevent speech around this area will pose a serious problem to unions, whose interest is to both allow open discourse and ensuring that a fair and representative election takes place. This sensitive issue will test a union's ability to set specific parameters that do not conflict with constitutionally protected speech.

III. Working Guidelines and Policy Proposals

Though it is easier to remain silent, the matters at issue cannot be resolved on their own, as the future only aggravates the problem. The cyber world has transformed the manner in which we communicate and with that transformation comes concern for the impact this new area of speech may have on society. The preceding discussion indicates that serious guidelines are necessary for the betterment of members, officers, unions as a whole, and even for employers with respect to social media use. There are no easy answers or quick solutions, but problems have been identified that can be addressed before they spiral out of control. The following guidelines seek to strike a balance between union interests and objectives and the right to speak and communicate freely on social media platforms.

A. Union Leadership Guidelines

When employees endorse a union as its collective bargaining agent, they submit to exclusive representation by that particular union and its elected leadership.[64] Union leadership sets the tone of expectations and upholds the duties with which they are entrusted. As with any position of power, corruption and wrongdoing are bound to occur both on purpose and by mistake. In order to limit the amount of misconduct by way of social media, the union should provide guidelines for appropriate handling of union leaders' social media accounts. Officer guidelines will be discussed in two parts: (1) distinguishing between personal and professional representations and how to manage each, and (2) preventing and reporting social media breaches of fiduciary duties.

64. *See* Emporium Capwell Co. v. Western Addition Cmty. Org., 420 U.S. 50 (1975) (standing for the proposition that the union is the exclusive representative of all employees).

i. Personal Accounts v. Professional Accounts

Distinguishing between personal statements and those made on behalf of the union as its representative remains a significant issue for union leadership. The hypothetical and real-life examples show how a single statement can act as the proverbial shot heard around the world. Perhaps the best suggestion for union leadership is to literally create separate social media accounts—one for personal use and one as a public profile for the leadership position assumed. This situation still runs the risk that comments made on the personal, private social profile may become public. However, if an officer or steward makes the effort to separate personal life from her official position, then she should not be punished or scrutinized in the same manner for exercising the right to speak freely.

Should a union leader opt to maintain a social media account recognizing her professional position, a recommended guideline can be taken from *Purple Communications*.[65] Official social media accounts should be monitored by other union officials just as employee email accounts may be. This way, an officer or steward has the opportunity to participate publicly in her position while also subjected to some oversight. The monitoring should not take place in a manner as rigorous as the workplace environment discussed in *Purple Communications* since social media accounts do not contain the same type of secrecy as emails. If unions feel overly intrusive by monitoring officers, one solution would be to require that official social media accounts always be made public rather than private. Public accounts replace the costs of monitoring with widespread accountability. However, this approach still runs the risk of creating serious backlash should gross and offensive comments occur, although the union can establish proper discipline for willful offenders. The key for official social media accounts is prevention and accountability.

The content of official accounts must also be addressed since monitoring may be watered down or absent completely. Obvious guidelines include avoiding posts involving language that may be construed as discriminatory, threatening, libelous, or objectionable as it may pertain to specific classes of people.[66] Moreover, officers and stewards should avoid engaging in specific attacks, especially if those

65. Purple Communications and Communications Workers of America, 361 N.L.R.B. 43 (Sept. 24, 2014).

66. *CWA Social Media Policy Guidelines, supra* note 9; *Guidelines for Use of Social Media by Officers*, YUSU, http://www.cwa-union.org/pages/cwa_social_media_policy_guidelines (last visited Sept. 20, 2015) [https://perma.cc/82S3-RAJP].

attacks are targeted at and disparage the union, members, or other leaders.[67] Professional accounts should also remain politically and socially neutral unless the union has already taken an official position on the matter. Otherwise, members feel misrepresented and the union as a whole risks public liability for the comments. Ultimately, professional accounts should exist to further union goals and inform members and the public alike on important positions. Thus, unions should only advise officials to create such accounts if they understand the limitations and responsibilities involved.

In contrast, personal social media accounts cannot and should not be limited or monitored. This protects the union from becoming a censor of free speech and allows the union leaders to partake in what is becoming an essential part of society. However, unions should advise officers and stewards to keep personal accounts private. While not possible for social media platforms, private accounts decrease the risk of making personal statements a public union issue. If social media accounts do not contain privacy settings or the unions do not make private accounts a requirement, then the same policies guiding official accounts can be applied here with regard to avoiding discriminatory, threatening, offensive, and libelous language. Union leaders using personal accounts should also be allowed to voice political opinions at will and endorse candidates as seen fit. Notwithstanding these provisions, union leaders should absolutely abstain from commenting on official union positions regardless of whether the disclosure is free from confidential information, as union officials must steer clear of further blurring the already fuzzy line between private and public life.

ii. Fiduciary Concerns

Addressing fiduciary breaches presents a more difficult task for the union. Officials often become the targets of bribes and blackmail due to their positions of power. Social media makes these threats more likely and thus increases the chance that fiduciary duties are breached since all that is required is a name. So, how should unions approach this position when, oftentimes, officers cannot even protect themselves?

Relating the previous guidelines to this situation makes sense. Since official accounts contain the officer's true and full name, they are most likely to be targeted. By monitoring the account, the union can ensure that the union leader is not under attack or unduly influ-

67. *CWA Social Media Policy Guidelines, supra* note 9.

enced by an adverse party. Furthermore, the public settings create accountability in regard to whom the officer contacts and who contacts the officer. Although nefarious parties may employ pseudonyms and anonymous accounts, a public account nevertheless detects abnormal conduct.

An officer may still be targeted on a private social media account, as communications can still be made without public acknowledgment or disclosure. This type of behavior is more difficult than the former since unions do not and should not monitor private behavior. Since prevention and detection are not feasible in this regard, the union must focus on post-misconduct. If a union official is suspected of wrongdoing with respect to her fiduciary duties, then prompt investigation should be made into social media accounts if it is a suspected means of misconduct. Although intrusive, members have the right to hold fiduciaries accountable for disloyal behavior. Officers and stewards can protect themselves by keeping a detailed history of all social media communications, both public posts and private messages. Should an officer delete accounts, messages, or any sort of history, a further investigation can be initiated at the behest of the union.

As leaders and representatives, union officials must carefully conduct themselves on social media. The guidelines and suggestions outlined here arm the union with the best tools possible for preventing, detecting, and deterring misbehavior on social media. Nonetheless, union officials and stewards should bear the ultimate burden as they agree to take on certain responsibilities on behalf of dependent workers who are seeking their aid and protection. When using social media, union officials and stewards should ask themselves whether or not that tweet is worth it; should the answer be yes, they should be prepared to deal with the repercussions.

B. Member Conduct Guidelines

Although union members do not bear the same responsibilities as those in leadership positions, their actions equally affect the union when they engage in improper social media conduct. Social media creates mountains from molehills as thousands of exchanges occur instantaneously through cyberspace. As fiery exchanges occur back and forth, words have the ability to transform into actions and actions transform into calamity, chaos, and discord. Further, a union divided cannot stand. So how do unions balance the freedom of speech with union objectives? Lucky for them, unions do not have to look too far because employment law is there to the rescue. Employment law has

already addressed similar concerns with respect to social media use and free speech of employees.[68] Thus, it can provide the adequate blueprint for advising conduct that does not conflict with basic individual rights so at odds with union concerns.

One of the most important, if not the most important lesson to be borrowed from employment law is that employees never shed their Section 7 rights.[69] Accordingly, unions should not and cannot limit or censor speech by members relating to "protected concerted activities."[70] Adapted from the work-related context to the union context at issue here, unions cannot prohibit social media use as it concerns workplace conditions, labor policies, and union leadership. While it may seem counter-intuitive to allow members to speak critically of the union, the union exists for their sole benefit. Just as social media has been implemented to create social change and make strong statements, union members also should have the opportunity to utilize social media to facilitate change that is important to them. Therefore, members should feel free to post, share, and even "like" each other's posts concerning union policies because they are guaranteed this right.[71]

Delineating what counts as protected concerted activity may prove to be an arduous task. In employment law, the undertaking is often met with confusion and hostility. For example, in *Costco Wholesale Corporation*[72] the Board determined that the retailer's policy prohibiting employees from posting messages that "damage the company, defame any individual or damage any person's reputation," violated the National Labor Relation's Act.[73] However, the Board did not explicitly state that defamatory remarks were protected, but that the loose framing of the rule would chill the speech of employees who would refrain from all protected Section 7 Activity.[74] If a union fears

68. *See* Douglas E. Lee, *NLRB bolsters private-employee speech*, First Amendment Ctr. (Sept. 14, 2011), http://www.firstamendmentcenter.org/nlrb-bolsters-private-employee-speech [https://perma.cc/33j7-VKN2].

69. *See Protected Concerted Activity*, Nat'l Labor Relations Bd., https://www.nlrb.gov/rights-we-protect/protected-concerted-activity (last visited July 14, 2016) [https://perma.cc/V5D6-ZSDK].

70. 29 U.S.C. § 157 (2012).

71. *See* Three D, LLC d/b/a Triple Play Sports Bar and Grille, *supra* note 35 (ruling than an employee's act of "liking" a Facebook comment by another employee complaining about wages was concerted, protected activity).

72. Costco Wholesale Corp. and United Food and Commercial Workers Union, Local 371, 358 N.L.R.B. 106 (2012).

73. *Id.* at 1.

74. *Id.* at 8–9.

that prohibiting defamatory remarks may cause an uproar or even a violation, they can engage in the balancing often done by the NLRB in these types of determinations. In that instance, the union must fairly balance the members' Section 7 rights against the union's interest in avoiding disparagement before committing to member discipline.[75]

When a member's social media conduct falls outside of the bounds of Section 7 protection, what should the union do? This is particularly problematic because personal speech cannot be curtailed. Besides, if union officers and stewards can freely speak their minds, then members should be able to too. Thus, the same prohibitions and advisements should be proffered in relation to member conduct. Unions should strongly suggest that members avoid using language that is discriminatory, libelous, threatening, or harassing.[76] Speech that incites violence remains unprotected, thus an outright restriction of this is proper. Also, there should be strict prohibitions against invading the privacy of other members by creating false accounts under pseudonyms for the purpose of harassment and dodging liability. Workplace policies set by the employer also aid the union in ensuring that members treat one another with dignity and respect. In terms of discipline, the union must use its full discretion to determine what is proper. Depending on the circumstances, first-time offenders should be dealt with leniently while willful, repeat offenders should face harsher punishment.

Prescribing social media behavior for members may be an uncomfortable thought. However, unions should focus on informing members about their rights and their responsibilities as part of the organization. Disagreement, debate, and discussion carve paths to solutions and help us better understand problems; but a line must be drawn when speech crosses over into disruption and leads to physical violence.

C. Election Regulations and Guidelines

Elections represent what makes us so proud to be American: our ability to meaningfully choose our representatives. On both a large and small scale, the right to choose remains near and dear to all of us.

75. *See* William Welkowitz, *Social Media: The New Big Tool for Union Organizing?*, BNA (Feb. 13, 2015), http://www.bna.com/social-media-new-b17179923064/ [https://perma.cc/ZE7D-NFUT] (describing the NLRA's protections in the social media context and the areas in which employees are and are not protected).

76. *See CWA Social Media Policy Guidelines*, *supra* note 9.

While not everyone regales in the victory of the winner, the integrity of the process and the benefit of choice mean something. The special case of the election highlights the importance of regulating social media and the difficulties connected with it. The following proposals discuss two aspects of ensuring a fair and representative election. First, I will suggest the ideal conditions under which elections should occur. Second, I will address the issue of political speech.

i. Election Conditions

Before ballots are cast, the proper environment must be set in order to guarantee that a legitimate result will prevail. As the hypotheticals of this Comment demonstrate, tensions run high and passions explode before a voter can even reach the ballot box. Even now in 2016, we cannot stop talking about the election, although our obsession began long before we even knew who was running.[77] Amid all of the excitement surrounding elections, misconduct occurs that may question the accuracy of the election and the integrity of the union. Therefore, unions have to implement the proper guidelines to safeguard this important process; and what better place to look for guidance than the regulations promulgated by existing labor policies.

Due to the vital role that unions play, they ardently compete with one another for representation. In those competitions, similar abuse misconduct may arise that jeopardize the legitimacy of a representation election. The NLRB has responded by requiring that "laboratory conditions" be maintained during elections.[78] Although not specific, the NLRB requires that elections be conducted in "an atmosphere conducive to the sober and informed exercise of the franchise, not only from interference, restraint, or coercion violative of the Act, but also from other elements that impede a reasoned choice."[79] Keeping with that standard, the Board has found that any party inciting racial or ethnic prejudice breaches such conditions in violation of the NLRA.[80] In contrast, misleading statements have not been found to rupture ideal election conditions.[81] These policies do not clearly spell

77. Alex Seitz-Wald, *The Presidential Election Does Start Earlier Every Four Years (but Don't Blame the Media)*, NATIONAL JOURNAL (Mar. 24, 2014), http://www.nationaljournal.com/daily/2014/03/24/presidential-election-does-start-earlier-every-four-years-dont-blame-media?mref=scroll [https://perma.cc/X25T-36LC] (reporting that by March 2014 over nine polls had been taken and 520 stories written about the 2016 election.

78. In the Matter of General Shoe Corp. et al., 77 N.L.R.B. 124 (1948).

79. *See generally id.*

80. Sewell Mftg. Co., 138 N.L.R.B. 66 (1962).

81. Shopping Kart Food Market, Inc., 228 N.L.R.B. 190 (1977).

out what is and what is not permissible, but they lay the ground for unions to address social media conduct during elections. By adopting these standards for officer elections, unions can address possible misconduct on a case-by-case basis without fear of interference with protected speech.

ii. Balancing Political Speech with Union Objectives

Political speech has played a vital role in American history, thus it is greatly protected. While a healthy dose of debate and disagreement advance progress, sometimes those thoughts manifest into something ugly and unexpected. So, how do unions differentiate from what is and what is not protected, especially during elections when serious repercussions are on the line?

Endorsing a candidate, advancing their positions, and discussing issues count as pure political speech that unions cannot proscribe, especially during elections. While not everyone will agree with each other and social media battles will play out, unions have no say in who members support and how they express that support. However, there is a distinction between political support and darker motives which may be masked through the guise of political speech. Campaigns have the tendency to draw support from those who take an idea and run with it in a very different and dangerous direction. Because of the sensitive nature of this issue, unions must use their utmost discretion to determine when speech has transformed from political to threatening.

As mentioned previously, language that incites violence does not receive any constitutional protections. Thus, this type of social media behavior can be prohibited and punished accordingly by union policies. Notwithstanding, threats are treated differently, especially when coupled with political speech. True threats on social media have been difficult to prove, as the standard is judged by the subjective intent of the poster.[82] When social media has been used as a platform to advocate violent behavior and strike fear in a general audience in connection with political objectives, even the social media sites themselves hesitate to take down postings in concern of censoring protected speech.[83]

However, social media and elections exacerbate the problem for unions. Not only do their members fear physical harm may come their

82. *See* Elonis v. United States, 135 S. Ct. 2001 (2015).
83. Greenberg, *supra* note 57.

way, but they are intimidated to the point of abstention in important elections that affect their livelihood. These certainly violate laboratory conditions and should be explicitly condemned and punished by unions. Furthermore, unions should investigate false accounts when threats and incitements occur, although other forms of anonymous speech should be allowed.[84]

Political speech is a scary subject when met with regulation; however, a union can limit speech when it not only interferes with the safety of its members but also compromises the integrity of the institution.

Conclusion

From the telegraph to the cellphone, the world has progressed in how it communicates and it only seems to be moving faster. With the advancement of technology, pros and cons will always exist. While we now can communicate from the click of a button, go platinum with one YouTube hit, or change the world with one tweet, we also face many challenges with these privileges. When we log on to our favorite social media sites we lose some of our privacy, open ourselves up to threats and harassment, and compromise our personal beliefs with our professional positions. Unions are now learning that they are not immune from these challenges as officers, stewards, and members are all likely to participate on social networking in one form or another.

Nearly fifty years ago, almost one in every three persons belonged to a union.[85] Today, only one in ten Americans belong to a union.[86] Unions are the heart and soul of the working class, and Americans cannot watch them disappear like the dinosaurs. Union leadership can no longer sit back and watch as an opportunity passes them by to make a positive change for their members. Social media issues, though they may seem petty now, can destroy the hard-working solidarity for which the union stands. Therefore, it is time for the union to address these issues immediately; they better act fast because every

84. *See generally* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (standing for the proposition that privacy and free speech through the use of anonymous campaigning comports with the tradition of advocacy and dissent in this country, and that the loss of speech and privacy protection outweighs the accountability concern of the government).

85. Quoctrung Bui, *50 Years of Shrinking Union Membership, In One Map*, NPR (Feb. 23, 2015), http://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map [https://perma.cc/EP9H-BTDA].

86. *Id.*

minute that passes, 2.5 million pieces of content will be shared on Facebook, 300,000 messages will be tweeted on Twitter, and 220,000 images will be shared on Instagram.[87]

87. Susan Gunelius, *The Data Explosion in 2014 Minute by Minute*, ACI (July 12, 2014), http://aci.info/2014/07/12/the-data-explosion-in-2014-minute-by-minute-infographic/ [https://perma.cc/GT9U-2SZM].